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TAXABLE INCOME FROM THE RECEIPT OF PROPERTY OTHER THAN CASH
L. L. Beacham

THE UNIFORM CODE OF MILITARY JUSTICE
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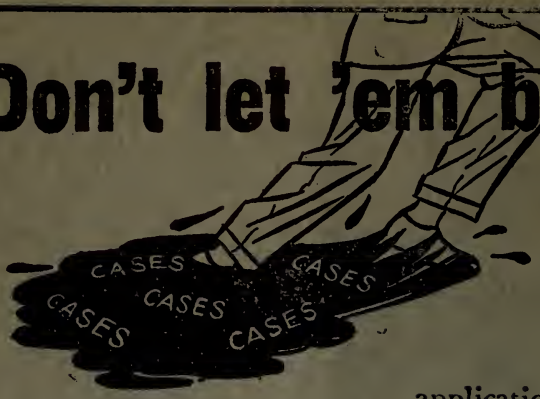

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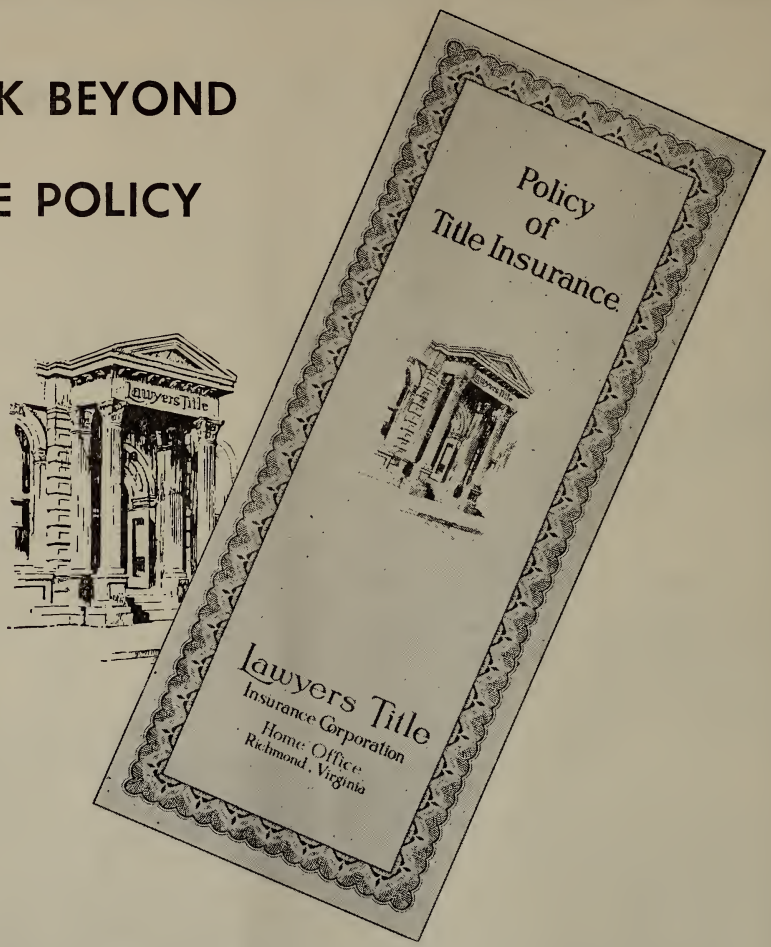

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Mississippi Law Journal

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TAXABLE INCOME FROM THE RECEIPT OF PROPERTY OTHER THAN CASH

*L. L. Beacham**

Probably no other phase of the federal income tax field has seen a more enlarged sphere of activity throughout the years than the concepts governing the realization of income from the receipt of something other than cash. Thoughts have come a long way from the conclusion of Judge Johnson in *United States v. Schillinger*[1] that under the Revenue Act of 1870 promissory notes were not income because

> In the absence of any special provision of law to the contrary, income must be taken to mean money, and not the expectation of receiving it, or the right to receive it at a future time.

The Congress was careful to provide in Sec. B of the Revenue Act of 1913 a provision thereafter reenacted down to the present Sec. 22(a) of the Code that there should be included in gross income "gains, profits and income . . . of whatever kind and in whatever form paid." Since then there has been no question that a receipt of property in some form other than cash may be income. In fact this provision has been utilized to find income to a taxpayer where actually he has received nothing of any substance or even has given away rather than received, under such doctrines as "constructive receipt,"[2] "forgiveness of indebtedness,"[3] the *Horst* "economic satisfaction" principle,[4] and such tax avoidance snares as the *Court Holding*[5] and *Clifford*[6] theories.

These facets of the problem are far beyond the scope of this work, however, being each sufficient within itself to justify a book. The purpose of this article is to treat the subject in one of its more limited aspects;

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*Attorney at Law, Jackson, Mississippi.

[1]27 Fed. Cas. No. 16,228, at 972 (C.C.S.D.N.Y. 1876) and see U.S. v. Smith, 27 Fed. Cas. No. 16,341 at 1174 (D.C.Ore. 1870), where this concept was rationalized that "although it might appear that one party or the other had gained by the exchange, that is, got property of greater value than what he gave cost him, yet this apparent gain might turn out otherwise, and is not realized until the property obtained is converted into cash or its equivalent."

[2]See CCH, Standard Federal Tax Reporter, ¶ 339 *et seq;* P-H, Federal Tax Service, ¶ 8400 *et seq.*

[3]See CCH, Standard Federal Tax Reporter, ¶ 77 *et seq;* P-H, Federal Tax Service, ¶ 7251 *et seq.*

[4]Helvering v. Horst, 311 U.S. 112 (1940).

[5]Comm. v. Court Holding Co., 324 U.S. 331 (1945).

[6]Helvering v. Clifford, 309 U.S. 331 (1940).

namely, the question of the time of realization or recognition as income where a taxpayer has received some form of tangible or intangible property under conditions which would make the receipt taxable if a "gain, profit or income" has been realized. Whether the receipt is in payment for a sale or exchange of property, a dividend, or compensation for services rendered, it will be assumed in every instance that the manner of receipt is a taxable one. The question to be discussed is when it will be taxed. And since the taxpayer is in each case actually receiving some form of property or property right, it should be borne in mind that his particular accounting method is of no concern. Where there is actual receipt under a claim of right, the accrual basis taxpayer is placed on a par with the cash basis taxpayer.[7]

General Discussion

It may be stated broadly that there are two major classes of property which may become taxable income. They are those forms of property which possess a present use ability or disposability, such as tangible property, stocks and securities, or negotiable instruments; and those forms of property evidencing a future right, such as a simple contractual promise to pay or account at a later date. Although these two classes may and do often overlap, it is obvious that the time a recipient realizes gain from one or the other should be substantially different. Therefore the subject will be treated generally from these two angles.

The Fair Market Value Rule

The primary consideration in determining the time of realization in connection with the receipt of property of any nature is whether it possesses any "fair market value." If any such value is present at the time of receipt, gain or loss will be realized as of that date.[8] It makes no difference whether the property received is real property,[9] personal property,[10] use of personal or real property,[11] schooling,[12] stocks or secur-

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[7]Brown v. Helvering, 291 U.S. 193 (1934); North American Oil Consolidated Co. v. Burnet, 286 U.S. 417 (1932); Taylor v. Comm., 51 F.2d 915 (3rd Cir. 1931); Gilken Corp., 10 T.C. 445.

[8]§§ 22(a), 42, 111(b), 115(j), I.R.C. and regulations thereunder. Oberwinder v. Comm., 147 F.2d 255 (8th Cir. 1945); D.D. Oil Co. v. Comm., 147 F.2d 936 (5th Cir. 1945); U.S. v. Pulver, 41 F. Supp. 20 (D.C.Fla. 1941).

[9]Pembroke v. Helvering, 70 F.2d 850 (D.C. Cir. 1934); U.S. v. Pulver, *supra* note 8; Harr v. MacLaughlin, 15 F. Supp. 1004 (D.C.Penn. 1936).

[10]I.T. 1304, C.B. June 1922, p. 72.

[11]Chandler v. Comm., 119 F.2d 623 (3rd Cir. 1941); Paulina Dean, 9 T.C. 25c (Acq); Olin Ellis, 6 T.C. 138; Henry T. Roberts, 7 T.C.M. 599 (CCH). *Cf.* Ralph Kitchen, 11 B.T.A. 855.

[12]I.T. 1304, I-1 C.B. 72; So.Op. 97, 4 C.B. 79. But Mim. 4411, XV-1 C.B. 497 exempts all amounts paid under acts relating to veterans.

ities[13] notes or mortgages,[14] or simple contractual rights.[15] Nor does it make any difference what the manner of receipt is, so long as it is a taxable one. Property received in exchange,[16] as payment of a dividend,[17] or as compensation for services[18] is income to the recipient to the extent of this value.

Apparently the only limitation upon this general rule is the question of its ascertainability. If it may in fact be proved that the property has no "ascertainable market value" by virtue of its speculative character,[19] contingencies upon its fulfillment,[20] or the insecure financial position of the obligor,[21] gain may be postponed until subsequent disposition of the property or receipt of the payment it calls for. Seldom is this the case, however, for the Treasury provides in its various Regulations[22] dealing with the subject that "only in rare and extraordinary cases will property be considered to have no fair market value"; and it is the burden of the taxpayer to submit sufficient affirmative evidence to overcome the Commissioner's

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[13]Comm. v. Robertson, 75 F.2d 540 (6th Cir. 1935), *cert. den.* June 6, 1935; Oxford Paper Co. v. U.S., 52 F.2d 1008 (Ct. Clms. 1932); Fred Barker, 28 B.T.A. 657; Fulton Iron Works Co., P-H MEMO. T.C. ¶ 48,004. Charlotte L. Andrews, 46 B.T.A. 607, script payment of bond interest.

[14]Saunders v. U.S., 101 F.2d. 133 (5th Cir. 1939); Gordon v. McCaughn, 9 F. Supp. 40 (D.C. Pa. 1934); Wells Amusement Co. v. Comm., 10 F.2d 560 (4th Cir. 1933); Homes Beautiful, Inc., P-H MEMO T.C. ¶ 47,166. The treasury implied in an early ruling, O.D. 842, C.B. June 1921, p. 89, that where notes could not be sold at a reasonable discount they would not be considered the equivalent of cash. However, this implication has not borne fruit, for decisions have found taxable fair market value as low as 11% of face value. Ives Dairy Co. v. Comm., 65 F.2d 135 (5th Cir. 1933). A different rule prevails as to bank discounted loans and commissions for loans, where the accounting method determines realization in the year made, or the year of actual payment of the loan. See P-H TAX SERVICE ¶ 6223-4A.

[15]B.C.M. 2612, C.B. Dec. 1927, p.187; John Q. Shunk, 10 T.C. 293; Rapid Transit Land Sales Co., 20 B.T.A. 608; Gertrude H. Sweet, 8 B.T.A. 404. But the rights must evidence a promise to pay a definite sum on a day certain. Cassatt v. Comm., 137 F.2d 745 (3rd Cir. 1943); Helvering v. Walbridge, 70 F.2d 683 (2nd Cir. 1934); Lucas v. North Texas Co., 281 U.S. 11 (1930). See U.S. v. Christine Oil & Gas Co., 269 Fed. 458 (D.C. La. 1920), where held prior to inclusion of present § 42(a) in the Rev. Act of 1916 (§§ 8g and 13d) that under the 1913 Act which taxed income "received within the year" deferred payment to for the sale of oil leases, unsecured and not represented by notes, were not income.

[16]§ 111(b), I.R.C.

[17]§ 115(j), I.R.C.

[18]U.S. Treas. Reg. 111, § 29.22(a)-2,3,4. U. S. v. Pulver, 41 F. Supp. 20 (D.C. Fla. 1941). Nor does it make a difference if the recipient is an independent contractor performing services, William E. Freeman, 4 T.C. 582.

[19]Helvering v. Tex-Penn Oil Co., 300 U.S. 11 (1937); Propper v. Comm., 89 F.2d 617 (9th Cir. 1937). And see cases cited *supra* notes 77-80.

[20]Lucas v. North Texas Co., 281 U.S. 11 (1930); Perry v. Comm., 152 F.2d 183 (8th Cir. 1945); Comm. v. Segall, 114 F.2d 706 (6th Cir. 1940); Bedell v. Comm., 30 F.2d 622 (2nd Cir. 1929).

[21]Seffie Foster, 10 B.T.A. 958; C. L. Starr, 9 B.T.A. 886; Lewis E. Stoddard, Jr., P-H MEMO T.C. ¶ 45,070.

[22]U.S. Treas. Reg. 111, §§ 29.22(a)-1,29.44-4,29.111-1.

determination.[23] Neverthless the taxpayer has sustained this burden in a number of instances.[24]

History of The Fair Market Value Rule

The fair market value requirement is one of judicial origin. Neither the Revenue Act of 1916 nor the 1917 Revenue Act contained any provision for determining income where property was received rather than cash. The rule was first introduced legislatively into the Revenue Act of 1918 in Sec. 202(b) to "establish the rule for determining taxable gains in the case of exchanges of property and to negative the assertion of tax in the case of certain purely paper transactions."[25] Apparently its motivating force was to overcome the *Schillinger* concept without diluting the "of whatever kind and in whatever form paid" clause of its practical effect. That this was sound reasoning on the part of the Congress was well illustrated by the attitude taken by the judiciary in decisions under the 1913 Act. In one decision[26] the receipt of minority stock in a family corporation was denied recognition as a "gain or profit" despite an intrinsic value on the grounds that it was inherent in the idea of income that property must have a "realizable market value" to be income in the year of receipt. Similarly, the Supreme Court had somewhat reiterated the *Schillinger* feeling first in the celebrated *Eisner v. Macomber*[27] stock dividend decision where Mr. Justice Pitney established the short-lived "wherewithal to pay an income tax" concept by accepting the definition of income as a gain or receipt of something of "exchangeable value"; and second,[28] by shortly thereafter refusing to recognize income from the receipt by a stockholder of a right to subscribe to a new issue of stock on the grounds that the 1916 statute meant that a tax was to be levied upon gains and profits "only when realized in money or money's worth."

The 1918 modification was at first somewhat unsatisfactory, due to a lingering of the idea that the property must really be at least the "equivalent" of cash. For example, a recipient of stock for which there was no ready market and the value of which could only be established by an appraisal of assets was held not taxable on the receipt itself.[29] On the other hand due

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[23]Anniston City Land Co., 2 B.T.A. 526; Kilburn Lincoln Machine Co., 2 B.T.A. 363.

[24]It appears to be becoming more difficult, however, as the need for federal revenue increases.

[25]Sen. Rept. No. 617, 65th Cong., 3rd Sess.

[26]Bourn v. McLaughlin, 19 F.2d 148 (D.C. Cal. 1927).

[27]252 U.S. 189 (1914). And see Walls v. Comm., 60 F.2d 347 (10th Cir. 1932).

[28]Safe Deposit and Trust Co. v. Miles, 259 U.S. 247 (1922).

[29]Tsivoglou v. U.S., 27 F.2d 564 (D.C. Mass. 1928), *aff'd.* 31 F.2d 706 (1st Cir. 1929); Heafey v. Allen, 34 F.2d 941 (D.C. Neb. 1929); Westpoint Investment Co., 1 B.T.A. 436.

to the existing concepts on the value of real property, it was considered that an exchange of farm lands would always be a "market value" transaction and taxable in the year of receipt.[30] Obviously in each case the intrinsic and perhaps realizable value might be the same. To place taxpayers on an equal footing therefore, the Congress changed the equivalent provision in Sec. 202(c) of the Revenue Act of 1921 to provide that gain or loss would not be recognized unless the property had a "readily realizable" market value. This phrase, however, was even more provocative of criticism and difficult of application. It was a question of fact in each case whether the value asserted was "readily realizable" and the evidence was often most uncertain.[31] Nor were the judicial tests of any satisfying consistency. In one case[32] it was held that the lack of a "public" market prevented stock in an oil venture from having any readily realizable market value, even though it was proved that friends and acquaintances of the taxpayer were trying to purchase the stock from him; while in another decision,[33] it was held that the lack of an immediate cash market for a sale of the property was not material, the term "readily" being relative and not absolute, meaning "easily or promptly." In a third middleground case,[34] it was concluded that even if there was no open market available, the property would nonetheless have a readily realizable market value "if [when] it were offered for sale . . . such sale would be at a fair price, reasonably approximating its intrinsic value."

The result was that Congress gave up its attempts to keep abreast of the judiciary and in Sec. 202(c) of the Revenue Act of 1924 went back to the simple "fair market value" standard as it stands today, the Senate Finance Committee[35] reporting that the "readily realizable" test could not be applied "with accuracy or consistency."

Determining Fair Market Value

It seems now well settled that the determination of fair market value is one of fact, to be determined from all the evidence bearing upon the issue.[36] Any factors relevant to the issue and indicative of value are usually

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[30]O.D. 429, C.B. June 1920, p. 38.

[31]Frischkoan Development Co., 30 B.T.A. 8, *aff'd.* 88 F.2d 1009 (6th Cir. 1937); Bassick v. Comm., 85 F.2d 8 (2nd Cir. 1936).

[32]Clarke v. Welch, 46 F.2d 563 (D.C. Cal. 1930).

[33]Fesler v. Comm., 38 F.2d 155 (7th Cir. 1930), *cert. den.* May 19, 1930.

[34]Comm. v. Newbury, 80 F.2d 631 (7th Cir. 1935).

[35]Sen. Rept. 398, 68th Cong., 1st Sess.

[36]Whitlow v. Comm., 82 F.2d 569 (8th Cir. 1936); Tracy v. Comm., 53 F.2d 575 (6th Cir. 1931), *cert. den.* 287 U.S. 632; Heiner v. Crosby, 24 F.2d 191 (3rd Cir. 1928); Mossman, Yarnelle & Co., 9 B.T.A. 45. See U.S. Treas. Reg. 111, § 29.117-8 where growing timber is concerned. This includes reasonable prospects for the future, U.S. v. Cole, 15 A.F.T.R. 524 (D.C. N.Y. 1928); Art Metal Construction Co., 4 B.T.A. 493.

admissible. For example, assessments,[37] appraisals,[38] book values,[39] a previous purchase price,[40] formula computations[41] and jury verdicts[42] have been utilized in various instances as evidentiary. Sales or stock exchange listings on an open and free market are considered the very best evidence,[43] provided they were not made under particular and unusual circumstances, such as forced sales, sales in a restrictive market or sales in small lots.[44] No one factor is necessarily determinative, however, for any are subject to rebuttal. It has been held that neither the value stated in the contract,[45] the par value of securities received,[46] nor proof of the amount obtained from actual sales of like products on the market[47] will free the entire factual picture from consideration. Everything pertinent to a determination is admissible if it comes within the general rules of evidence.

Nor is the determination limited to past and present factors. It is true that the point of cleavature is the date of receipt, even though the value actually changes for the worse before the end of the taxable year,[48] but it has been consistently held that the court may receive anticipatory factors such as changes in the community status,[49] population and business growth,[50] the earning power of property,[51] the imminence of war,[52] and

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[37]Pitney v. Duffy, 291 Fed. 621 (D.C. N.J. 1923); Samuelson, Exec., 10 B.T.A. 860.

[38]Koepfe v. Comm., 41 F.2d 606 (9th Cir. 1930); Jerecki Mfg. Co., 12 B.T.A. 1165 (Acq.); Georgia Mfg. Co., 4 B.T.A. 893.

[39]Cameron v. Comm., 56 F.2d 1021 (3rd Cir. 1932); L. J. Christofer, 13 B.T.A. 729; Flint River Brick Co., 2 B.T.A. 31. And also earnings of the business, Texas-Empire Pipe Line Co. v. Comm., 127 F.2d 220 (10th Cir. 1942). Book value is often based on assets and earning power, Benj. E. May, 35 B.T.A. 84; Maco Stewart, Exec., 32 B.T.A. 442.

[40]W. C. Arthurs, 3 B.T.A. 374.

[41]Rheinstrom v. Willcuts, 26 F. Supp. 306 (D.C. Minn. 1939); A.R.R. 252, C.B. Dec. 1920, p. 26. In regard to intangibles such as good will, see A.R.M. 68, C.B. Dec. 1920, p. 23.

[42]John II Estate, Ltd. v. Jones, Dist. Ct., Terr. of Hawaii, 1928.

[43]Comm. v. Robertson, 75 F.2d. 540 (6th Cir. 1934); Comm. v. Swenson, 56 F.2d 544 (5th Cir. 1932); Est. of Millie L. Wright, 43 B.T.A. 551; Chandler, 3 B.T.A. 146 (Acq.); Fulton Iron Works Co., P-H MEMO T.C. ¶ 48.004. This is true despite book value to the contrary, Supplee-Biddle Hardware Co., P-H MEMO T.C. ¶ 43,132, *aff'd.* 144 F.2d 711 (9th Cir. 1944); Fred Barker, 28 B.T.A. 657.

[44]Steckel v. Comm., 154 F.2d 4 (6th Cir. 1946); Bechles v. Comm., 87 F.2d 228 (7th Cir. 1937); Walter v. Duffy, 287 Fed. 41 (5th Cir. 1923); Est. of Paul M. Vandenhoeck, 4 T.C. 125; Ackerman-Johnson Co., 11 B.T.A. 820.

[45]Matter of Ptolemy, 282 Mich. 353, 276 N.W. 476 (1937).

[46]Jackson Sanitarium, 9 B.T.A. 734; Wallis Tractor Co., 3 B.T.A. 981. And even book value may be rebutted by other evidence, Griffiths v. Comm., 70 F.2d 946 (7th Cir. 1934); Nolting v. Tait, 3 F.Supp. 686 (D.C. Md. 1933); Frank C. Rand, 40 B.T.A. 233.

[47]Brown v. Comm., 94 F.2d 101 (6th Cir. 1938); Crowell v. Comm., 62 F.2d 51 (6th Cir. 1933). See F.E. Heath, 7 B.T.A. 114.

[48]J. Kemp Bartlett, 28 B.T.A. 285, *aff'd.* 71 F.2d 601 (4th Cir. 1934); Anita Owens Hoffer, 24 B.T.A. 22.

[49]T. B. Eastland, 10 B.T.A. 1245 (Acq).

[50]Detroit Egg Biscuit & Specialty Co., 9 B.T.A. 1365 (Acq.).

[51]Tracy v. Comm., 53 F.2d 375 (6th Cir. 1931).

[52]H. S. Frieder, B.T.A. MEMO. OP., Dec. 12,813-A (CCA).

anticipated abandonment or improvement of property.[53] And in addition, the court may consider subsequent facts and circumstances demonstrating the receipt day value,[54] even though they be in contradiction of computations of value at any antecedent date, if the final determination is one of "sound judgment."[55]

In regard to this receipt date evaluation rule, it is interesting to note that it has been criticized on one point. In the case of *Strong v. Rogers,*[56] the court discussed the case where a taxpayer received stock during one of the upswing moments of a fluctuating market and upheld the Tax Court in placing a value upon the securities less than the stock exchange listings. It was pointed out that the use of the word "fair" in the statute indicated an intention that consideration should not be given to "exceptional and extraordinary circumstances giving an abnormal value for the moment to stock." This conclusion received no affirmance in other decisions, however, and shortly thereafter was severely criticized in the case of *W. T. Grant Co. v. Dugan,*[57] where Judge Patterson stated, with several Supreme Court decisions being cited as authority,[58] that

> I cannot follow the argument that the market value must be disregarded because of the presence of the Stock Market boom. Hindsight tells us that prices of stock were far too high at that time because of speculation. But the market value was the real value, fully as real as if the prophecies of the future then current had turned out to be true. The actual value of property is what a purchaser in fair and free market conditions would have given for it in fact, not what a court at a later time may think a purchaser would have been wise to give. To ignore the proofs given by a free and active market and to concoct a synthetic value based on assets and earnings or on the opinions of experts would be to shut our eyes to reality.

On its face, this seems to be a logical and practical rationalization, but it does seem difficult to reconcile with the "anticipation" and "subsequent events" rules, and the following market for sales discussion.

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[53]Santa Maria Gas Co., 10 B.T.A. 1412 (Acq.); Chattanooga Mattress Co., 4 B.T.A. 464 (Acq.).

[54]Nachod & U.S. Signal Co. v. Helvering, 74 F.2d 164 (6th Cir. 1934); H. H. Millers Industries Co. v. Comm., 61 F.2d 412 (6th Cir. 1932); W. Oscar Williams, 16 B.T.A. 109.

[55]The Portage Silica Co., 11 B.T.A. 700, *aff'd.* 49 F.2d 985 (6th Cir. 1931), *cert. den.* December 3, 1934. And the opinions of intelligent men experienced in the business may be utilized in reaching a "sound judgment," Heiner v. Crosby, 24 F.2d 191 (3rd Cir. 1928); Edward W. Payne, 12 B.T.A. 781.

[56]72 F.2d 455 (3rd Cir. 1923), *cert. den.* December 3, 1934.

[57]18 F. Supp. 724 (D.C. N.Y. 1937).

[58]Ithaca Trust Co. v. U.S., 279 U.S. 151 (1929); New York v. Sage, 239 U.S. 57 (1915).

The Presence of a Market Question

In determining the fair market value of a particular item of property, it would seem that the term in and of itself requires the presence of a market for a sale of the property. Such is not the case, however. Although it has been held that the fact that stock is closely held and none of it is sold in the open market is of great consequence in the determination,[59] there is little doubt that today the lack of a ready market for sale of the property is not necessarily determinative of a lack of fair market value.[60] Although it has been often reiterated that non-negotiable notes, whether compensation for services,[61] or in exchange for property,[62] are not taxable until payment is received on the theory that they have no fair market value, it is equally well established that there is no necessity of a "current market," so long as the property is of a class "which is the subject of a sale," such as promissory notes not marketable as ordinary commercial paper, but which the evidence indicates will be paid when due.[63]

In other words, the important consideration seems to be whether the recipient could have under any circumstances sold his rights to the future payments. The most generally accepted judicial definition of fair market value is

> the price which property will bring when it is offered for sale by one who is willing, but is not obliged to sell it, and is bought by one who is willing or desires to purchase but is not compelled to do so.[64]

Under this definition it is not necessary that the property even be for sale or that there be a known buyer for it.[65] The fact that the property is

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[59]Comm. v. Insurance & Title Guarantee Co., 36 F.2d 842 (2nd Cir. 1930), *cert. den.* October 13, 1930.

[60]Oberwinder v. Comm., 147 F.2d 255 (8th Cir. 1945); Wright v. Comm., 50 F.2d 727 (4th Cir. 1931). But it may be decisive, if a contingent factor is involved, such as the principle asset of the corporation being the subject of litigation, rendering the stock worthless. Champlin v. Comm., 71 F.2d 23 (10th Cir. 1934).

[61]Charles C. Ruprecht, 16 B.T.A. 919, *aff'd.* 39 F.2d 458 (5th Cir. 1930); I. T. 2046, III-2 C.B. p.56. Nor is an open account, William A. Hines, 38 B.T.A. 1061.

[62]Carling Dinkler, Exec., 22 B.T.A. 329; Dudley T. Humphrey, 32 B.T.A. 280; Mainard E. Crosby, 14 B.T.A. 980.

[63]Whitlow v. Comm., 82 F.2d (8th Cir. 1936). See D. D. Oil Co. v. Comm., 147 F.2d 936 (5th Cir. 1945). This is the "closed transaction" theory. See B. S. Roberts, 7 B.T.A. 1162, where deposit of notes in escrow under a collateral agreement did not prevent sale being a closed transaction. And see Wray-Dickinson Co., 6 B.T.A. 269. As to non-negotiable notes received as compensation, the note rule still applies. Rhodes v. U.S., 65 F. Supp. 188 (D.C. Tex. 1946).

[64]Metropolitan Street R.R. v. Walsh, 197 Mo. 392, 94 S.W. 860. Accepted in principle, T.B.R. 57, I.C.R. 40; Halbert K. Hitchcock, 4 B.T.A. 273. And see Phillips v. U.S., 12 F.2d 598, 601 (D.C.Penn. 1926) where the court added "both having reasonable knowledge of the facts."

[65]Chicago Railway Equipment Co. v. Blair, 29 F.2d 10 (7th Cir. 1927).

"single purpose" property will not prove a lack of fair market value.[66] The definition implies in every receipt of property the existence of a public of buyers at a fair price.

This implication has met at least one very harsh criticism. In the case of *Helvering v. Walbridge*[67] the profound remonstrance was made by Judge Learned Hand that

> . . . perhaps there need not be a "market" to establish a "market value," but there must be some assurance that the value is what a "market" would establish, and a "market" itself presupposes enough competition between buyers and sellers to prevent the exigencies of an individual from being exploited. It may well imply that the goods have several possible buyers of the same goods or their substantial equivalent, so that a hardpressed buyer shall not have to accept the first offer. "Willing" adds nothing, for if the trade goes through at all, both must be willing, and the degree of their reluctance is not a serviceable measure.

Again the straw house erected around the taxpayer was to be blown down, however. Judge Hand's two-buyer concept was never again reiterated, and shortly thereafter the Sixth Circuit in the case of *Doric Apartment Co. v. Comm.*[68] ruled that where "property has no ready or an exceedingly limited market, as is the case made here by the evidence, fair market value may be ascertained upon considerations bearing upon its intrinsic worth." Thus the "intrinsic worth" theory began its subsequent evolution into "property which is the subject of a sale"[69] thence into the "economic or financial benefit" theory of the famous *Smith*[70] stock option case and the deferred compensation decisions to be discussed hereafter.

The Ascertainability Requirement

As aforementioned, property will be taxed in the year of receipt only if it has a fair market value, and that value is ascertainable with reasonable certainty. If any such fair market value is found, the amount of cash plus this value of the property other than cash will be reportable in the year of receipt to the extent that it exceeds the basis of the property exchanged therefor. The remaining amounts to be received, if the case is one of deferred payments, will be reportable in the year of actual receipt to the extent that they exceed the prorated difference between the selling price

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[66]Joseph Stulberg, 11 B.T.A. 463.
[67]70 F.2d 683 (2nd Cir. 1934), *cert. den.* October 8, 1934.
[68]94 F.2d 895 (6th Cir. 1938). And see Whitlow v. Comm., 82 F.2d 569 (8th Cir. 1936).
[69]Whitlow v. Comm., *supra* note 68.
[70]Comm. v. Smith, 324 U.S. 177 (1945).

and the basis adjusted to the amount reported as fair market value in the year of receipt.[71] However, there are many cases in which it will be determined that there is no fair market value; i.e., that there is no "ascertainable" fair market value.

For example, one of the few successful attacks on the treasury's determination was made in the *Helvering v. Tex-Penn Oil Co.*[72] decision, where the Supreme Court refused to find an immediate realization of income where the shares of stock received had a speculative quality and were received under a restrictive agreement making a sale of the property impossible at the time. This conclusion was reached despite earlier decisions[73] that a tax could not be postponed or prevented by agreements among holders of stock intended to restrict control or to bolster the market where some sort of market existed at the time. The effect of this decision was rather confusing, for it could not be determined whether the speculative factor or the restrictive agreement was controlling. Apparently both were important for subsequent decisions reiterated the rule that although voluntary agreements such as pooling arrangements[74] would not prevent a finding of present market value, a bona fide arm's-length restriction for a period of more than one year would prevent taxability in the year of receipt.[75] The *United States v. State Street Trust Co.*[76] decision even implied that the restriction for a period of more than one year would of itself make the value so speculative that it could not be reasonably ascertained.

It was in such cases as these, and those dealing with contractual promises based on contingent future events, such as payments from oil production,[77] assignments of creditor's claims or accounts receivable,[78] Mixed Claims

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[71] § 42, I.R.C. U.S. v. Pulver, 41 F. Supp. 20 (D.C. Fla. 1941); William T. Bivin, 21 B.T.A. 1051; W. R. Jaques, 5 B.T.A. 56. See example at P-H FEDERAL TAX SERVICE ¶ 6704. This is true providing the defferment does not come within the provisions of the installment section. § 144, I.R.C.

[72] 300 U.S. 481 (1937). See Propper v. Comm., 89 F.2d 617 (2nd Cir. 1937).

[73] G. & R. Mfg. Co. v. Comm., 76 F.2d 454 (4th Cir. 1935); T. W. Henritze, 38 B.T.A. 1173; James Conzens, 11 B.T.A. 1040.

[74] Fostoria Glass Co. v. Yoke, 45 F. Supp. 962 (D.C. W.Va. 1942); Edith G. Goldwasser, 47 B.T.A. 445, *aff'd.* 142 F.2d 556 (2nd Cir. 1944), *cert. den.* November 6, 1944. See Newman v. Comm., 40 F.2d 225 (10th Cir. 1930), *cert. den.* October 13, 1930.

[75] Heiner v. Gwinner, 114 F.2d 723 (3rd Cir. 1940); Est. of M. J. Hammer, P-H MEMO T.C. ¶ 43.457; Thomas Watson, P-H MEMO T.C. ¶¶ 45,334, 45,361.

[76] 124 F.2d 948 (1st Cir. 1942).

[77] Comm. v. Deering, 192 F.2d 91 (5th Cir. 1939); Comm. v. Edwards Drilling Co., 95 F.2d 719 (5th Cir. 1938); F.H. E. Oil Co., 41 B.T.A. 130. But in this case, the capital invested in the contract may not be recouped before income results. Lee v. Comm., 126 F.2d 825 (5th Cir. 1942).

[78] Bullens v. U.S., 29 A.F.T.R. 1436 (D.C. Pa. 1941); Wesler Bros. Inc., 12 B.T.A. 1394; Santa Maria Gas Co., 10 B.T.A. 1412. See S.M. 3820, C.B. Dec. 1925, p.32.

Commission awards,[79] and personal annuity agreements,[80] that a different rule was imposed. In the ordinary case, where the obligation of the purchaser was fixed and sure to materialize sooner or later, the payments made on notes or contract rights were taxable pro rata as received each year, on the "closed transaction" theory.[81] But if the future payments were not certain to materialize in an ascertainable manner, it was obvious that the taxpayer might in the end lose his investment. Therefore, it was decided that he should first recover that investment made by his consideration given for the promise.

Two early lower court decisions[82] had ruled prior to 1931 that a taxpayer must report income from each payment made on an evidence of indebtness received for an exchange of property as partly a return of capital and partly income, the receipts being allocable to capital and income in the ratio that the total capital to be recovered bore to the total anticipated receipts. However, the Supreme Court held in 1931 in the case of *Burnet v. Logan*[83] that the taxpayer was entitled to a full recovery of the basis of her investment before there could be any realization of gain from the transaction, and that income should only be reported in the amount of and the year that the actual receipts exceeded that basis. In that decision the taxpayer had sold stock for a cash consideration and an agreement of the buyer to pay an additional amount for each ton of ore removed from a certain mine. The court said in regard to the promise that

> The consideration for the sale was $2,200,000 in cash and the promise of future money payments wholly contingent upon facts and circumstances not possible to foretell with anything like fair certainty. The promise was in no proper sense equivalent to cash. It had no ascertainable fair market value. The transaction was not a closed one. Respondent might never recoup her capital investment from payments only conditionally promised. Prior to 1921, all receipts from the sale of her shares amounted to less than their value on March 1, 1913. She properly demands the return of her capital investment before assessment of any taxable profit based on conjecture.

The rule has been followed in nearly all subsequent contingency cases, such as those mentioned in the preceding paragraph. However, it has been held inapplicable to a case where the property is of such a nature that the taxpayer's investment will not be lost by failure of the obligor to fulfill the promise, as in a timber-cutting contract.[84] Further, it was decided by the

[79]**Helvering v. Drier, 79 F.2d 501** (4th Cir. 1934); Comm. v. Speyer, 77 F.2d 824 (2nd Cir. 1935), *cert. den.* October 28, 1935.

[80]Hills Est. v. Maloney, 58 F. Supp. 164 (D.C. N.J. 1944); Bella Hommel, 7 T.C. 992; Frank C. Deering, 40 B.T.A. 984.

[81]See note 63 *supra.*

[82]Hitchock v. Comm., 44 F.2d 756 (6th Cir. 1930); Eldredge v. U.S., 31 F.2d 924 (6th Cir. 1929).

[83]283 U.S. 404 (1931).

[84]Brown v. Comm., 69 F.2d 863 (5th Cir. 1934), *cert. den.* October 8, 1934.

Board in *Marbelite Corp. of America*[85] that it would not apply to an ordinary real estate subdivision trust in the absence of proof of exceptional facts. The lack of assurance of future receipt must be clearly shown.

The "ascertainable" requirement finds an almost exact parallel to the "closed transaction" and "recovery of capital" theories in the application of the "forfeitability" rationale to the deferred compensation cases. Basing their reasonings on several early decisions[86] that payment by an employer of premiums on a life insurance policy payable to a beneficiary designated by the employee is taxable compensation to the employee in the year paid, the courts have held employees taxable in the year of contribution on amounts paid by employers into insurance company annuities[87] or trust pension plans[88] wherever the employees' rights are nonforfeitable except for failure to pay premiums. It makes no difference whether the annuity or pension is purchased by a single premium or by annual premiums,[89] or that the employee, if he does not live long enough, may never collect the full amount on which he has been taxed.[90] The indefeasible vesting of the rights in the employee is the sole determining factor. If his rights under the plan are forfeitable, the recipient employee will not realize compensatory income until actual receipt of the future payments.[91]

Nor does it make any difference to taxability in the year of contribution that the annuity is not assignable or commutable.[92] In fact it is of no consequence that the employee may actually be entirely unable to lay his hands on any cash in the year of receipt from disposition of the obligation. In the case of *Oberwinder v. Commissioner*[93] an employer had purchased for certain employees annuity contracts which had no cash surrender or loan value at the time of delivery and their right to receive cash income under the contract was postponed for a period of eight years. Neverthe-

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[85]30 B.T.A. 1151.

[86]Geo. M. Adams, 18 B.T.A. 381; N. Loring Danforth, 18 B.T.A. 1221. But there is an exemption in the case of group insurance, U.S. Treas. Reg. 111, § 29.22(a)-3.

[87]Hackett v. Comm., 159 F.2d 121 (1st Cir. 1946); Renton K. Brodie, 1 T.C. 275. Nor does it matter if they are purchased through the medium of a nonqualifying trust, Hubbell v. Comm., 150 F.2d 516 (6th Cir. 1945); Harold G. Perkins, 8 T.C. 1051; J. H. McEwen, 6 T.C. 1018. And this follows in the case of purchase for an independent contractor, William E. Freeman, 4 T.C. 582.

[88]David W. Anderson, 5 T.C. 1317; C. B. Russell, 5 T.C. 974.

[89]Paul A. Draper, 5 T.C. 209; Richard R. Deupree, 1 T.C. 113.

[90]U.S. Treas. Reg. 111, § 29.22(b)(2)-5.

[91]Harold G. Perkins, 8 T.C. 1051; Julian Robertson, 6 T.C. 1060; Adolph Zuker, 33 B.T.A. 324. See D. C. Knapp, 41 B.T.A. 23 and Est. of A. M. Berry, 44 B.T.A. 1254 where it was held that penalty of not being permitted to re-enter profit-sharing plan once benefits were withdrawn was a sufficient condition on the employee's rights to make them "forfeitable."

[92]Hackett v. Comm., 159 F.2d 121 (1st Cir. 1946); Renton K. Brodie, 1 T.C. 275. But see Ward v. Comm., 159 F.2d 502 (2nd Cir. 1947), where language indicates that the Second Circuit might make a distinction between assignable and nonassignable rights.

[93]At page 259.

less, since it was certain that they would eventually receive the full amount expended in the purchase of the contract, they were taxed in the year of receipt on that amount, Judge Piddick of the Eighth Circuit saying,[94]

> It is true that the annuity contracts had no cash surrender loan value at the time of their delivery, and that the right of the petitioners to receive cash income under the terms of the contract was postponed for a period of eight years after their delivery. But it does not follow that the contracts were devoid of present value to petitioners on the date of delivery to them. It cannot be said that on their receipt the petitioners realized no economic gain.

This is certainly a great extension of the "fair market value" concept, and at least in compensation cases would seem to abrogate entirely the "restrictions on sale" part of the Tex-Penn rule.

In a case with a somewhat different fact pattern, it was further established that the "forfeitability" rule was the sole test. In *Hubbell v. Commissioner,*[95] a corporation had purchased annuity contracts for the benefit of two officer-stockholders and in addition had established a trust for collection and distribution of the annunities with provisions in the policy contracts that the annuitants could not withdraw any cash surrender value while in the employ of the company. The Sixth Circuit found the amounts contributed taxable in the year of payment on the grounds that the trustee was a "mere conduit," and the fact that the annuitants would have to leave the employ of the company was found, therefore, to be of no consequence. The vesting of the recipient's rights were the sole determining factors. Once the rights have become indefeasible, it makes no difference that the recipient will actually receive his due only in the future. The sole exception to this rule seems to be the case where the employer has not made any contribution but has only given his personal unsecured agreement.[96] And even this will be taxable to the employee in the year of delivery if the employer has set aside a special fund for fulfillment of the agreement.[97]

In passing, it is interesting to note that these compensation agreements may not establish the rules for exchange situations. For example, in the case of stock options it is well established by the *Choat v. Commissioner*[98] decision that a stockholder recipient will be taxed in the year of exercise of the option only on the spread between the option price and the fair market price at the time of exercise or at the time of receipt whichever is the lesser; while in the case of an employee, the oft-cited case of *Commis-*

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[94]147 F.2d 255 (8th Cir. 1945).
[95]150 F.2d 516 (6th Cir. 1945).
[96]Wolfe v. Comm., 170 F.2d 73 (9th Cir. 1948); William E. Freeman, 4 T.C. 582 (1945); Charles C. Ruprecht, 16 B.T.A. 919 *aff'd.* 39 F.2d 458 (5th Cir. 1930); I.T. 2046, III-2 C.B. 56.
[97]Miller v. Comm., 144 F.2d 287 (4th Cir. 1944).
[98]129 F.2d 684 (2nd Cir. 1942).

sioner v. Smith[99] has established that the taxable gain to the employee in the year of exercise will be the spread at the time of exercise, regardless of the spread or lack of it at the time of receipt, on the theory that

> Section 22(a) of the Revenue Act is broad enough to include in taxable income any economic or financial benefit conferred on the employee as compensation whatever the form or mode by which it is effected, . . .

Note the similarity between this rationale and the *Oberwinder* case theory, and the dissimilarity when compared with the *Logan* or *Tex-Penn* decisions.

Conclusion

It is difficult to say that the increasing scope of income realization from the receipt of property rights has not been justified. The enlarged use of paper transactions and the growth of the credit manner of buying have both contributed much to the problem. Obviously, new concepts had to be developed to meet the new schemes of transacting business. Cash money has been supplanted in practically all large business deals by the use of contractual obligations of some sort, and even in the every-day small transactions between smaller taxpayers this fact is becoming more evident.

The main criticism of the author is not with the growing recognition of intrinsic worth, but with the often impractical abolition of any need for a market upon which the property may be sold. It is too obvious for discussion that the result of these rules is often that a taxpayer recipient must either sell his property short of its taxable evaluation or must himself borrow money to pay the tax. True, the government will take away a man's property to pay his tax, but not at the government's evaluation of its worth. On the contrary, they will apply towards the taxpayer's tax liability only that amount for which the government may actually sell the property. This it would seem is a bit unfair to say the least. But just treatment is many times wholly foreign to the tax field.

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[99]324 U.S. 177 (1945).

THE UNIFORM CODE OF MILITARY JUSTICE

*A. B. Butts**

Introduction

On May 31, 1951 the Uniform Code of Military Justice became effective.[1] Under this code all members of the armed forces of the United States are subject to one set of disciplinary laws. Prior to that date each branch of the Department of National Defense, Army, Navy (including Marine Corps), Air Force,[2] and Coast Guard, had its own code of justice, applied by its own courts. The Eighty-First Congress passed, and on May 5, 1950 the President signed, "An Act to unify, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard, and to enact and establish a Uniform Code of Military Justice."[3] The new Code generally became effective May 31, 1951.[4]

It is well at the outset to call attention to the fact that, except for the court of final resort, the Court of Military Appeals, each of the services retains its own system of trial courts, largely as they have existed in the past.

For each of the services of the armed forces after May 31, 1951, the trial courts will be (1) General courts-martial, (2) Special courts-martial, and (3) Summary courts-martial.[5] These are the trial courts which have existed prior to May 31, 1951, though in the Navy the courts were called (1) General courts, (2) Summary courts, which corresponded to the Special courts of the Army, and (3) Deck courts, which corresponded to the Summary courts of the Army.

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[1] 64 Stat. 107 (1950). This is the fourth article on the subject of military courts and the administration of military justice by the author to appear in the Mississippi Law Journal. See, Butts, *The Judge Advocate General's Department of the United States Army*, 15 Miss. L. J. 113 (1943); Butts, *How the Army Transforms Lawyers Into Judge Advocates*, 16 Miss. L. J. 21 (1943); Butts, *The Judge Advocate General's Corps of the United States Army*, 21 Miss. L. J. 203 (1950).

[2] 22 Stat. 1014, 5 U.S.C. § 627 (k) (Supp. 1948). Since the separation in 1947 of the Air Force from the Army, the Articles of War and the Army Manual for Courts-Martial have applied to the United States Air Force as well as to the Army, though administered by the Judge Advocate General of the Air Force and the Judge Advocate General's Department of the Air Force.

[3] 64 Stat. 107 (1950).

[4] 64 Stat. 107 (1950), Art. 140, § 5. See also Art. 140, § 12, for provisions of the Act which became operative prior to May 31, 1951.

[5] 64 Stat. 107 (1950), Art. 16.

[6] Manual for Courts-Martial, United States §§ 2, 101 (1951).

The agencies through which military jurisdiction will be exercised for the entire armed forces establishment under the Uniform Code of Military Justice are:[6]

The Court of Military Appeals;

Boards of Review in the offices of the several Judge Advocates General;

Courts-Martial: General, Special, and Summary;

Military Commissions and Provost Courts;

Commanding Officers and Officers in Charge (exercising non-judicial powers under Article 15 of the Uniform Code of Military Justice);

Courts of Inquiry.

In the Army and the Air Force legal officers are called judge advocates or judge advocate officers; in the Navy and Coast Guard they are called law specialists.

It is not the purpose of this article to outline the detailed changes made by the adoption of the Uniform Code of Military Justice in the provisions which have governed the Army, the Air Force, the Navy (including the Marine Corps), and the Coast Guard, but only to point out the major changes in organization and procedure which follow the adoption of the new Code and the new Manual for Courts-Martial.[7] It is interesting to note that the Uniform Code of Military Justice makes fewer changes in the old Articles of War which applied to the Army and the Air Force than it makes in the Articles for the Government of the Navy and the disciplinary laws of the Coast Guard.

New Manual for Courts-Martial

The effective date of the Code provided by the terms of the Act of Congress of May 5, 1950 was postponed for about a year in order to allow time for the preparation of a new Manual for Courts-Martial. The Act provides that "all rules and regulations shall be uniform in so far as practicable."[8]

A joint committee composed of eight Department of National Defense lawyers—six Army officers, one Navy officer, one Air Force officer—devoted several months to the work of preparing a single new Manual for

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[7]Manual for Courts-Martial, United States (1951), in force and effect in the armed forces of the United States on and after May 31, 1951. For general reference on military law, see Colonels Morris O. Edwards and Charles L. Decker, *The Serviceman and the Law,* (1951); Colonel Frederic B. Wiener, *The Uniform Code of Military Justice,* (1951).

[8]64 Stat. 107 (1950), Art. 36(b).

Courts-Martial to supersede the 1949 Army Manual (applicable also to the Air Force), the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard. The Articles of War are acts of Congress. By Executive Order 10214 dated February 8, 1951, the President prescribed the Manual for Courts-Martial, United States, 1951. The first official copy of the new Manual (in effect the criminal code of the Armed Forces) was printed in the *Federal Register,* February 10, 1951,[9] soon after which time the bound volumes were ready for distribution to the three services of the National Military Establishment.

The Articles of War (and the Army Manual for Courts-Martial) have applied to the United States Air Force since its separation from the Army in 1947,[10] though administered under the technical supervision of the Judge Advocate General of the Air Force.[11] Hence the new Code and the new Manual for Courts-Martial (1951) mean one set of disciplinary laws in the place of three sets of laws formerly applying to (1) the Army and Air Force, (2) the Navy (including the Marine Corps), and (3) the Coast Guard.

Major Changes in Court Organization

For the Army and Air Force the principal changes in organization of military courts are (1) the establishment of the Court of Military Appeals as the court of final jurisdiction, (2) the elimination of the Judicial Council, for which the Court of Military Appeals is substituted, (3) the provision that only lawyers will prosecute and defend cases before a General Court-Martial,[12] (4) the authorization of the law officer (new law member) of a General Court-Martial[13] to rule on the law[14] and to advise in open court as to the form of findings,[15] with no vote[16] as a member of the court, but with the duty of acting as a civilian judge acts in instructing a jury,[17] (5) the provision that any enlisted man can object to trial by summary court-martial unless he has first been offered and has refused company punishment.[18]

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[9]Exec. Order No. 10214, 16 Fed. Reg. 1303-1469 (1951).
[10]61 Stat. 495 (1947).
[11]62 Stat. 1014, 5 U.S.C. § 627(k) (Supp. 1948).
[12]62 Stat. 643, 10 U.S.C. § 61 (Supp. 1948); Article of War 11.
[13]There is no law officer of a Special Court-Martial. The President of a Special Court-Martial rules upon interlocutory questions. See, 64 Stat. 107 (1950), Art. 51(b).
[14]64 Stat. 107 (1950), Art. 51(b); Manual for Courts-Martial, § 57(a) (1951).
[15]Manual for Courts-Martial, § 57(c) (1951).
[16]64 Stat. 107 (1950), Art. 26(a).
[17]64 Stat. 107 (1950), Art. 51(c).
[18]Non-judicial powers exercised by commanding officers or officers in charge, under Art. 15 of the Uniform Code of Military Justice, and Chapter XXVI. §§ 128-135 of the Manual for Courts-Martial. See, Wiener, *The Uniform Code of Military Justice,* p. 24 (1951), where the opinion is expressed that this right "is bound to hamper disciplinary administration at the level of the more minor and hence most frequent infractions."

Comment should be made on one of the major procedural changes. The 1948 Act of Congress[19] corrected the evil under the old law which permitted the appointing authority to appoint a lawyer to prosecute (the Trial Judge Advocate) and a non-lawyer to defend (Defense Counsel). The rule there established was that in all cases in which a lawyer was appointed as trial judge advocate, it was required that the defense counsel also should be a lawyer if the accused so demanded. The 1948 law provided that[20]

> "the trial judge advocate and defense counsel of each general court-martial shall, if available, be members of the Judge Advocate General's Corps or officers who are members of the bar of a Federal court or of the highest court of a State of the United States."

The words "if available" are omitted from the law which became effective May 31, 1951. Moreover, the accused is not required to request or demand defense by a lawyer. Lawyers only will prosecute and defend before General Courts-Martial.[21] It should be noted that the name of the prosecutor before military courts has now been changed from Trial Judge Advocate to Trial Counsel. Every General Court-Martial will have a lawyer as law officer and lawyers only as trial counsel and defense counsel.[22]

Under the terms of the Uniform Code of Military Justice and the new Manual for Courts-Martial (1951) members and law officers of courts-martial may be appointed from one of the armed forces other than the one of which the accused is a member, but it is provided that[23]

> "Whenever it is necessary to convene a court composed of members of more than one armed force, at least a majority of the membership of a general or special court-martial sitting for the trial of a case should be members of the same armed force as the accused unless exigent circumstances render it impracticable to obtain such members without manifest injury to the service."

Boards of Review

Boards of Review as they have existed in the Army Judge Advocate General's Office as intermediate appellate agencies, with power to weigh

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[19]62 Stat. 643, 10 U.S.C. § 61 (Supp. 1948); Article of War 11.
[20]41 Stat. 789 (1920), as amended, 62 Stat. 629, 10 U.S.C. § 1482 (Supp. 1948); Article of War 11.
[21]64 Stat. 107 (1950), Art. 27(b).
[22]Manual for Courts-Martial, § 6 (1951).
[23]Manual for Courts-Martial, § 4(g) (1951).

evidence and cut down sentences,[24] remain and will function in each of the services of the armed forces, but with a very important change which authorizes, but does not require,[25] the use of civilian lawyers on the Boards. It is provided[26] that

> "The Judge Advocate General of each of the armed forces shall constitute in his office one or more boards of review, each composed of not less than three officers or civilians, each of whom shall be a member of the bar of a Federal court or of the highest court of a State of the United States."

It is required that the Judge Advocates General shall refer to a board of review the record in every case of trial by court-martial in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal of an officer, cadet, or midshipman, dishonorable or bad conduct discharge, or confinement for one year or more.[27]

The Court of Military Appeals

The Uniform Code of Military Justice Act[28] provides that the Court of Military Appeals shall consist of

> "three judges appointed from civilian life by the President, by and with the advice and consent of the Senate, for a term of fifteen years. Not more than two of the judges of such court shall be appointed from the same political party, nor shall any person be eligible for appointment to the court who is not a member of the bar of a Federal court or of the highest court of a State."

The system of military courts as provided in the Uniform Code of Military Justice makes one radical change and some less drastic changes from the old system. The principal major change is found in the Court of Military Appeals. In the establishment of this appellate court the Judicial Council of the Army Judge Advocate General's Office is abolished. The Judicial Council was composed of three general officers of the Judge Advocate General's Corps. No change is made in the provision of the law that in the Judge Advocate General's Corps, Regular Army, there shall be five general officers: two major generals and three brigadier generals.

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[24] It is provided that the Board of Review "shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." 64 Stat. 107 (1950), Art. 66(c).

[25] See, Wiener, *The Uniform Code of Military Justice*, p.14 (1951), where he calls attention to the fact that "the authorization of civilians is not a requirement, but was a concession to the Coast Guard, which is also subject to the Code." 64 Stat. 107 (1950), Art. 1, § 2.

[26] 64 Stat. 107 (1950), Art. 66 (a)(c).

[27] 64 Stat. 107 (1950), Art. 66(b); Manual for Courts-Martial, § 100 (1951).

[28] 64 Stat. 107 (1950), Art. 67(a).

The judges of the Court of Military Appeals receive a salary of $17,500 a year and are eligible for reappointment. The President designates from time to time one of the judges to act as Chief Judge. The Court has power to prescribe its own rules of procedure and to determine the number of judges required to constitute a quorum.[29] In order that there might be time for organizational purposes prior to May 31, 1951, under the terms of the Act, the first appointees were to be nominated by the President three months before the time (May 31, 1951) when the Court would begin to operate. At the time of nomination, the President was to designate one of the judges to serve five years, until May 1, 1956; one to serve ten years, until May 1, 1961; one to serve fifteen years, until May 1, 1966. Provision is made that "any judge appointed to fill a vacancy prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor."[30]

Although the judges of the Court of Military Appeals are not given life tenure they are given the type of security considered so essential to members of the Federal judiciary. The Act provides that the judges of the Court of Military Appeals "may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, or upon the ground of mental or physical disability, but for no other cause."[31]

The President may designate a judge of the United States Court of Appeals to fill the office for the period of disability of any judge of the Court of Military Appeals who is temporarily unable to perform his duties because of illness or other disability.[32]

Under the provisions of the Uniform Code of Military Justice the Court of Military Appeals shall review the following classes of cases from the Army, the Air Force, the Navy (including the Marine Corps), and the Coast Guard:[33]

(1) All cases in which the sentence, as affirmed by a board of review, affects a general or flag officer or extends to death;

(2) All cases reviewed by a board of review which The Judge Advocate General orders forwarded to the Court of Military Appeals for review; and

(3) All cases reviewed by a board of review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.

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[29] 64 STAT. 107 (1950), Art. 67(a).
[30] 64 STAT. 107 (1950), Art. 67(a) § 2; 64 STAT. 107 (1950), Art. 140, § 5.
[31] 64 STAT. 107 (1950), Art. 67(a)(3).
[32] 64 STAT. 107 (1950), Art. 67(a)(4).
[33] 64 STAT. 107 (1950), Art. 67 (b)(1)(2)(3). See Manual for Courts-Martial, § 101 (1951).

Under the terms of the Uniform Code of Military Justice[34] and the provisions of the new Manual for Courts-Martial,[35] effort is made to prevent delays when under the third of the foregoing powers of the highest appellate Military Court writs of certiorari are presented to the Court, for it is provided both in the statute and in the Manual that

> "the accused shall have 30 days from the time he is notified of the decision of a board of review to petition the Court of Military Appeals for a grant of review. The Court shall act upon such petition within 30 days of the receipt thereof."

Since the civilian Court of Military Appeals is an entirely new part of the machinery for the administration of military justice in the United States, some of the procedural rules as provided in the Uniform Code of Military Justice and in the 1951 Manual for Courts-Martial will be examined here:[36]

1. In a case reviewed by it, the Court acts only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the board of review.

2. In a case which the Judge Advocate General[37] orders forwarded to the Court, action need be taken only with respect to the issues raised by him.

3. In a case reviewed upon petition of the accused, action need be taken only with respect to issues specified in the grant of review.

4. The Court shall take action only with respect to matters of law.

5. If the Court sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing.

6. If the Court sets aside the findings and sentence and does not order a rehearing it shall order that the charges be dismissed.

7. After it has acted on a case, the Court may direct the Judge Advocate General to return the record to the board of review for further review in accordance with the decision of the Court. Otherwise, unless there is to be further action by the President, or the Secretary of the Department, the Judge Advocate General shall instruct the convening authority to take

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[34]64 STAT. 107 (1950), Art. 67(c).
[35]Manual for Courts-Martial, § 101 (1951).
[36]64 STAT. 107 (1950), Art. 67; Manual for Courts-Martial, § 101 (1951).
[37]Each of the three services of the armed forces has its own Judge Advocate General, and except when the Coast Guard is operating as a part of the Navy the term "Judge Advocate General" includes not only the three Judge Advocates General (Army, Navy, Air Force) but also the General Counsel of the Treasury Department, of which Department the Coast Guard for some purposes operates as a part.

action in accordance with that decision. If the Court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

8. Specific procedures are laid down in cases affirmed by the Court which must have action by the Secretary of the Department concerned.[38]

9. If a sentence as affirmed by the Court extends to death or affects a general or flag officer, the record of trial, the decision of the board of review, the recommendation of the Judge Advocate General, and the decision of the Court of Military Appeals must be transmitted to the Secretary of the Department concerned for the action of the President as required by the statute.[39]

A wise provision is included in the Uniform Code of Military Justice looking to the continuous improvement of the administration of military justice. It is provided that[40]

> "The Court of Military Appeals and the Judge Advocates General of the armed forces shall meet annually to make a comprehensive survey of the operation of this code and report to the Committee on Armed Services of the Senate and the House of Representatives and to the Secretary of Defense and the Secretaries of the Departments the number and status of pending cases and the recommendations relating to uniformity of sentence policies, amendments to this code, and any other matters deemed appropriate."

It has been correctly stated that "the keystone of the Army system of military justice and one which has no counterpart in civil jurisdictions in the United States is the provision for automatic appellate review of all records of trials by courts martial."[41] It should further be stated that appeals are always without cost to the accused.

The Judge Advocate General of the appropriate armed force appoints in his office one or more officers as appellate government counsel, and one or more officers as appellate defense counsel. It is the duty of appellate government counsel to represent the United States before the board of review or the Court of Military Appeals when directed to do so by the Judge Advocate General. It is the duty of appellate defense counsel to represent the accused before the board of review or the Court of Military Appeals,[42]

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[38]Manual for Courts-Martial, § 101 (1951).
[39]See note 38 *supra.*
[40]64 STAT. 107 (1950) Art. 67 (g).
[41]The Army Almanac (1950), U.S. Printing Office, a book of facts concerning the Army of the United States, at page 740.
[42]64 STAT. 107 (1950), Art. 70. See, Manual for Courts-Martial, § 102(b)(3) for statement of duties of appellate defense counsel in regard to advice to the accused as to whether there are meritorious grounds for petitioning the Court of Military Appeals for a grant of review, and of duties of appellate defense counsel in connection with the petition in any event if the accused desires to file such petition.

(1) when he is requested to do so by the accused; or
(2) when the United States is represented by counsel; or
(3) when the Judge Advocate General has transmitted a case to the Court of Military Appeals.

Military appellate counsel also perform such other functions in connection with review or court-martial cases as the Judge Advocate General directs.

The accused always has the advantage of military counsel without cost to himself. If, however, the accused desires he has the right to be represented before the Court of Military Appeals or the board of review by civilan counsel if provided by him.[43]

The following figures for one year (fiscal year 1945) based on reports and records of trial received by the Army Judge Advocate General's Office indicate the extent and the influence of the Army Judge Advocate General's Corps on the administration of military justice under the automatic appellate review procedures: Appellate Reviews (1) by General courts-martial, persons tried, 25,482; persons convicted, 23,913; confinement adjudged, 21,534, (2) by Special courts-martial, persons tried, 175,591, and (3) by Summary courts-martial, persons tried, 279,146. For the Special courts and the Summary courts the records were examined for errors, defects or omissions by Staff Judge Advocates in the field.[44] For General courts the records were reviewed for legal sufficiency of evidence and jurisdictional errors by Staff Judge Advocates in the field and by the Office of the Judge Advocate General.[45] Some idea, too, may be had from the figures on reviews by General courts-martial of the work which confronts the new Court of Military Appeals.[46]

Conclusion

After May 31, 1951, the administration of military justice in the United States began operating under two radically different principles from any previous time in the history of the country. Those two principles are (1) a uniform code of military justice for all branches of the armed forces, and (2) a single final appellate tribunal composed of three civilian judges. There are other significant changes. All have been made with the view to the improvement of the administration of military justice.

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[43]64 Stat. 107 (1950), Art. 70(d); Manual for Courts-Martial, § 102(c) (1951).
[44]The term "in the field" is applied to all matters handled outside the Office of the Judge Advocate General in Washington.
[45]The Army Almanac, p.742 (1950).
[46]The Court of Military Appeals is the Court of final appellate jurisdiction for cases from all of the branches of the armed forces; the figures given are for the Army and Air Force only.

TAXATION OF TRANSFERS IN SATISFACTION OF MARITAL RIGHTS: A NOTE ON *HARRIS v. COMMISSIONER*

*Harold G. Wren**

In recent years, the taxpayer has not won too many tax cases in the United States Supreme Court.[1] He has considered himself fortunate if able to have his case reviewed by that august body at all. Accordingly, when the Supreme Court grants his request for certiorari in a significant tax case and further decides in his favor, the case would seem to present an occasion for some extended remarks on the point of law involved.

On February 27, 1943, the taxpayer entered into a property settlement agreement with her then husband, Reginald Wright. The net worth of her estate was in excess of one million dollars. Wright's estate was similarly substantial. Each agreed to transfer certain property to the other, and to release the other from all claims arising out of their marriage. Accordingly, the taxpayer transferred to Wright property valued at $107,150.78 in excess of the amount which he transferred to her. Of this amount, $41,291.88 represented the then value of her promise to pay Wright $416.66 monthly for ten years.

On March 6, 1943, the taxpayer was granted a divorce in Reno, Nevada. In granting the divorce, the court approved the property settlement agreement and found that the payments of $416.66 per month were "in discharge of a legal obligation which, because of the marital relationship, has been imposed upon the plaintiff."[2] The Commissioner determined a deficiency in gift tax for 1943 on the theory that the transfers made by the taxpayer to her husband pursuant to a property settlement agreement adopted in a subsequent decree of divorce were not for an "adequate and full consideration in money or money's worth." The Tax Court expunged the deficiency,[3] relying on its earlier decision in *Barnard's Estate*.[4]

On appeal by the Commissioner, the Court of Appeals for the Second Circuit sustained the determination of the deficiency,[5] relying on its earlier

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[1] *Cf:* Comm. v. Church, 335 U.S. 632 (1949); Comm. v. Spiegal, 335 U.S. 701 (1949); Comm. v. Jacobson, 336 U.S. 28 (1949); etc.

[2] *Quaere:* Did the "legal obligation" to pay this amount stem from the property settlement agreement, or from the marital relation itself?

[3] Cornelia Harris, 10 T.C. 741 (1948). The taxpayer had also petitioned for a redetermination of gift tax deficiencies for the years 1940, 1941 and 1942, on the theory that the transfer of bank deposits in the United States by a nonresident alien were not subject to gift taxes. The rejection of this argument by top court was affirmed on the taxpayer's appeal. See note 6 *infra*.

[4] 9 T.C. 61 (1947). This case was subsequently reversed in Commissioner v. Barnard's Estate, 176 F.2d 233 (2nd Cir. 1949).

[5] Harris v. Commissioner, 178 F.2d 861 (2nd Cir. 1949).

reversal of *Barnard's Estate*.[6] The Supreme Court granted the taxpayer's petition for certiorari,[7] and subsequently handed down its opinion reversing the holding of Judge Learned Hand.[8]

For purposes of the federal estate tax, Section 811(b) of the Internal Revenue Code requires the inclusion in the gross estate of all property which is subject to dower, curtesy, or an estate created by statute in lieu of dower or curtesy.[9] The section first appeared in the Revenue Act of 1918,[10] the language having continued unchanged in the Internal Revenue Code. Under this section, the Commissioner has sought unsuccessfully to tax an antenuptial transfer as part of the gross estate.[11]

Section 811(i)[12] of the Internal Revenue Code provides for the inclusion in the gross estate of a decedent, any property subject to an *inter vivos* transfer to the extent that such property is transferred for less than an "adequate and full consideration in money or money's worth." Section 812(b) provides for the deduction of claims against the estate "to the extent that they were contracted for bona fide and for an adequate and full consideration in money or money's worth." The last paragraph of Section 812(b) reads as follows:

> For the purposes of this subchapter, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, *or of other marital rights in the decedent's property or estate,* shall not be considered to any extent a consideration "in money or money's worth." (Italics added).

Section 1002 of the Internal Revenue Code imposes the gift tax on transfers for less than an "adequate and full consideration in money or money's worth" to the extent that the value of the property transferred is in excess of the value of the consideration received.[12] There is no specific statement in the gift tax statute to the effect that the relinquishment of marital rights shall not constitute a money's worth consideration.

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[6]See note 5, *supra.*

[7]339 U.S. 917 (1950).

[8]Harris v. Commissioner, 71 Sup. Ct. 181 (U.S. 1950). Mr. Justice Douglas wrote the opinion of the Court in which Vinson, Reed, Jackson, and Clark. JJ., concurred; Mr. Justice Frankfurther wrote the dissent in which Black, Burton, and Minton, JJ., concurred.

[9]I.R.C. § 811(b).

[10]The section was apparently inserted to avoid the result reached by some of the state courts which had held that these interests were not includible in the gross estate since no new interest was created by the surviving spouse at date of death. See Matter of Starbuck, 137 App. Div. 866, 122 N.Y. Supp. 584 (1910). A similar provision appears in the Mississippi Inheritance Tax Statute. Miss. Code § 9266(b) (1942).

[11]See Estate of Harry E. Byram, 9 T.C. 1 (1947); *acq.*, 1947-2 Cum. Bull. 1.

[12]Unlike Section 812(b), there is no special provision in Chapter 4 of the Code (the Gift Tax) which states that a transfer in satisfaction of marital rights is not for an "adequate and full consideration in money or money's worth."

The estate tax regulations merely reiterate the statutory language of Section 812(b).[13] The gift tax regulations provide in part as follows:

> A consideration, not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift.[14]

Since the Regulations do not add very much to the Code, it is necessary to examine the case law to understand the taxation of transfers in satisfaction of marital rights. The cases fall into two categories:

(1) antenuptial transfers

(2) postnuptial transfers incident to separation agreements or divorce decrees.

In *Empire Trust Co. v. Commissioner,*[15] the decedent and his wife were both persons of property. They entered into an antenuptial agreement whereby they released each other from all marital claims against each other. The agreement further provided that the decedent should leave her $50,000 if she survived him, in complete extinguishment of all claims given by law and waived by the agreement. The executors under the decedent's will sought to deduct the $50,000 from the gross estate as a claim against the estate under Section 303(a) (1) of the Revenue Act of 1926.[16] In holding that the $50,000 was not deductible, the Court pointed out that the Revenue Act of 1932 had amended the prior Act so as to expressly state that the relinquishment or promised relinquishment of dower should not be considered "to any extent a consideration 'in money or money's worth.' "[17] Further, the legislative history of the 1932 Act showed that the amendment was declaratory of the law as it existed in the Revenue Act of 1926, and was made to avoid any misinterpretation of the act.[18]

In *Commissioner v. Wemyss*[19] the taxpayer in an antenuptial agreement, provided his bride-to-be with a block of stock of a fair market value of $149,456. This was in lieu of an annual income of $5484 defeasible on marriage to which she was entitled under a trust set up by a former husband. In holding the transfer taxable as a gift, Mr. Justice Frankfurter pointed out that neither the marriage to the donor nor the detriment to the donee could be considered an adequate and full consideration

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[13]U.S. Treas. Reg. 105, § 81.29 (1943), as amended, and § 81.36, as amended.
[14]U.S. Treas. Reg. 108, § 86.8 (1939).
[15]94 F.2d 307 (4th Cir. 1938).
[16]44 STAT. 72, 26 U.S.C.A. § 412 (1926).
[17]47 STAT. 280, 26 U.S.C.A. § 412 (1932).
[18]In Conner v. Bender, 125 F.2d 796 (6th Cir. 1942), a similar antenuptial arrangement was held not to be deductible under the Revenue Act of 1932.
[19]324 U.S. 303 (1945).

money or money's worth. In a companion case,[20] he pointed out that the estate and gift taxes should be construed *in pari materia,*[21] and since the release of marital rights did not constitute a money's worth consideration for purposes of the estate tax, it similarly did not constitute a money's worth consideration for purposes of the gift tax. Three members of the Court[22] dissented on the equally logical ground that the failure to include a specific provision in the gift tax law to the effect that a transfer in satisfaction of marital rights could not be a transfer for an adequate and full consideration in money or money's worth indicated a Congressional intent to permit the relase of marital rights, not donative in intent or effect, as a "money's worth" consideration for purposes of the gift tax.

In *Meyer's Estate v. Commissioner,*[23] the decedent and his wife entered into a separation agreement whereby the decedent agreed that he would pay a certain amount periodically to her, and at his death, should she survive him, he would pay the commuted value of additional payments for the rest of her life. Accordingly, at the decedent's death, his executor paid up the arrears and the commuted value of additional payments for the rest of her life, and then sought to deduct these amounts on the decedent's estate tax return, as a claim against the estate. In holding that the claim was not deductible, Judge Chase pointed out that the wife's right of support was "fairly within the phrase 'other marital rights in the decedent's property or estate' though not of the same nature as dower." In his dissent Judge Learned Hand commented on this holding as follows:

> "The only question before us is whether the consideration of his first wife's claim for alimony was the surrender of any 'marital rights in the decedent's property or estate.' Laying aside the dower which was trifling, what she gave up was her right to support by him during their joint lives; because although his promise did indeed extend beyond his death, that we may disregard for it is only the consideration that matters. It seems to me a perversion of terms to say that a wife's right to support is a 'right in the decedent's property,' like dower. She can of course collect it out of his property, but so can any other creditor collect his claim; the words mean something more than that, or they mean nothing at all. I do not think that their meaning is far to seek. Section 302(b) of the Revenue Act of

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[20]Merrill v. Fahs, 32 U.S. 308 (1945). Semble, Commissioner v. Bristol, 121 F.2d 129 (1st Cir. 1941), John D. Archbold, 42 B.T.A. 453 (1940); but *Cf.* Lasker v. Commissioner, 138 F.2d 989 (7th Cir. 1943).

[21]See Estate of Sanford v. Commissioner, 308 U.S. 39 (1939); but see Smith v. Shaughnessy, 318 U.S. 176 (1943).

[22]Mr. Justice Reed, Mr. Chief Justice Stone, and Mr. Justice Douglas. Mr. Justice Reed wrote the dissenting opinion. All three had previously concurred with the majority in Commissioner v. Wemyss, *supra* note 19. Mr. Justice Roberts dissented in both cases.

[23]110 F.2d 367 (2nd Cir. 1940).

1926, 26 U.S.C.A. Int. Rev. Code, § 811(b), had included in the gross estate dower, curtesy and any statutory substitutes for either; § 804 of the Act of 1932 provided, primarily at any rate, against the taxpayer's escape by creating a personal claim in consideration of the surrender of these rights. Had the section stopped there, I submit that there could have been no possible doubt that it was directed only against such an evasion. I agree that we must find some added purpose in the added words, and that too I think is fairly apparent: they were to include any marital jus in re which was not dower or curtesy, or their statutory substitutes. It is true that I cannot think of any, but that seems to me neither conclusive, nor important; statutory draughtsmen often provide against possibilities which have not yet arisen. The primary purpose of the section as a whole, the coupling of the phrase in question with dower and curtesy, the form of its concluding clause and the redundancy of that clause, if no more was meant than that the claim should be collectible from the spouse's assets; all these seem to me effectively to conspire against the Board's position."

In a later case,[24] Judge Hand ruled that the satisfaction of a child's support rights was a money's worth consideration, while the satisfaction of the wife's support rights was not. To the extent that a revocable trust was set up to satisfy the latter, it was includible in the gross estate.[25]

While a transfer in satisfaction of marital rights was not for an adequate and full consideration in money or money's worth where part of a separation agreement, the courts reached a different result where such a transfer was incorporated in a divorce decree.

In *Edythe C. Young,*[26] the Board of Tax Appeals ruled that an amount paid by the executrix in compromise of the decedent's first wife's alimony claim was deductible from the decedent's gross estate, since such a claim was not founded upon a promise or agreement, but upon a decree of court fixing and determining the amount of an obligation imposed by law.[27] In a later case, Judge Learned Hand said of the distinction:

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[24]Helvering v. United States Trust Co., 111 F.2d 576 (2nd Cir. 1940), *cert. denied,* 311 U.S. 678 (1940).

[25]In an earlier estate tax case the Board of Tax Appeals, had drawn the same distinction with reference to the deductibility of claims against the estate. Estate of Eben B. Phillips, 136 B.T.A. 752 (1937). See also Commissioner v. Weiser, 113 F.2d 486 (10th Cir. 1940), Adriance v. Higgins, 113 F.2d 1013 (2nd Cir. 1940), Rogan v. Riggle, 128 F.2d 118 (9th Cir. 1942).

[26]39 B.T.A. 230 (1932). See also Commissioner v. State Street Trust Co., 128 F.2d 618 (1942); Fleming v. Yoke, 53 F. Supp. 552 (N.D. W. Va. 1944), affirmed on opinion below, *sub nom.* Yoke v. Fleming, 145 F.2d 472 (4th Cir. 1944); Silas B. Mason, 43 B.T.A. 813 (1941).

[27]In this connection, it should be remembered that, for purposes of the federal income tax, alimony payments received subsequent to a decree of divorce or separate maintenance payable over a period of ten years or more are income to the wife and deductible by the husband. I.R.C. §§ 22(k) and 23(u).

> At first blush the distinction may seem a little formal but on consideration it appears to be sound. One can of course say that a divorce decree is "founded" upon the testimony of the witnesses, and in that sense the decree of the Nevada court in the case at bar was "founded" upon the separation agreement. But it is pretty clear that that is not the sense in which § 812(b) uses the word; rather it means that the legal transaction which created the obligation is the agreement, and in that sense the allowances are not "founded" upon the agreement but upon the command of the court.[28]

Shortly after the decision of the *Maresi* case, the Commissioner promulgated a ruling[29] which stated what the practice of the Bureau would be with reference to transfers in satisfaction of marital rights. For purposes of both the estate and gift taxes,[30] a transfer, whether it was incident to a separation agreement or a part of a divorce decree, would be deemed to be for an adequate and full consideration in money or money's worth to the extent that such a transfer was in satisfaction of the wife's support rights.[31]

It soon became apparent, however, that the Tax Court was not going to accept E. T. 19, at least so far as transfers in connection with divorce decrees were concerned. The Tax Court had held that property settlements incident to divorce should be distinguished from antenuptial transfers in that the former type situation involves an arm's length transaction in which there is no donative intent.[32] In *Edward B. McLean,*[33] the Court said:

> For reasons not clear to us, E. T. 19 excepts support and maintenance from marital rights the release of which does not constitute full and adequate consideration. We deem the ruling invalid in so far as it does not except transfers made to settle presently enforceable claims.[34]

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[28]Commissioner v. Maresi, 156 F.2d 929, 931 (1946).

[29]E.T. 19, 1946-2 CUM. BULL. 166.

[30]The Commissioner relied on the *pari materia* doctrine of Merrill v. Fahs, *supra* note 20.

[31]The Commissioner stated that Meyer's Estate v. Commissioner, *supra* note 23, and Helvering v. United States Trust Co., *supra* note 24 would not be followed "to the extent that they hold that the right of a divorced wife to support from a former husband during the joint lives of the parties is a marital right in his property or estate."

[32]Herbert Jones 1 T.C. 1207 (1943), Edmund C. Converse 5 T.C. 1014 (1945), *affirmed* 163 F.2d 131 (2nd Cir. 1947), Matthew Lahti, 6 T.C. 1 (1946), Clarence B. Mitchell, 6 T.C. 159 (1946), Albert B. Moore, 10 T.C. 393 (1948), Norman Taurog, 11 T.C. 1016 (1948), William Barclay Harding, 11 T.C. 1051 (1948).

[33]11 T.C. 543 (1948).

[34]11 T.C. 543, 541 (1948); *Cf.* Disney, J. Dissenting at p. 551:

"The majority view here is essentially based on the idea that if a husband and wife are estranged they so deal at 'arm's length'; that there is full and adequate consideration in money or its worth within the statute. Though, romantically speaking, the parties in the Wemyss and Merril v. Fahs cases might be thought not to have dealt at 'arm's length' during their courtship, in any real business sense the transfers in those cases were as much at arm's length as in the instant case. In the Wemyss case the

The Commissioner's position was finally adopted by the Second Circuit. In *Commissioner v. Barnard's Estate,*[35] the distinction between antenuptial transfers and transfers incident to separation and divorce was said to be a "distinction without a difference."[36] The transfer in *Barnard's Estate,* as in the *Harris* case, was from the wife to the husband, and hence did not involve the wife's support rights. In *Harris,*[37] Judge Learned Hand distinguished *Barnard's Estate*[38] from *Converss,*[39] on the ground that the divorce decree in the latter case involved a departure from the terms of the property settlement. The agreements in *Barnard's Estate* and *Harris,* on the other hand, provided that they should "survive" the divorce decree.

It was with this background that the *Harris* case came before the Supreme Court. In the opinion of the majority of the Court, the divorce decree precluded the treatment of the transfer by the taxpayer as if it were "founded on a promise or agreement." In his dissenting opinion, Mr. Justice Frankfurter quoted from Judge Hand's opinion at length, including that part of the opinion which reads as follows:

> . . . in the case at bar, the Nevada decree having declared that the agreement was "entitled to be approved," that included the provision that its "covenants" should "survive" as well as any of its other stipulations. Thus the payments made under it were "founded" as much upon the "promise or agreement" as upon the decree; indeed, they were "founded" on both; the parties chose to submit themselves to two sanctions—contempt under the divorce court and execution under the contract. The payments were therefore subject to the gift tax.[40]

The decision of the Supreme Court in the *Harris* case renders E. T. 19 rather ineffective.[41] Theoretically it could still be applied to postnuptial transfers which do not involve a court decree. The importance of the

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wife-to-be required her future husband to make a transfer to her to make up for income which she would lose from another source, marriage obviously being dependent on such an arrangement. In Merrill v. Fahs, *supra,* the husband-to-be made the transfer to his wife-to-be in order to secure from her a release of marital rights which otherwise she would have had after marriage. Can there be any question that these transfers were not actuated by the ordinary donative intent existing between sweethearts? Is there any possible difference between the consideration actuating the release of marital rights in Merrill v. Fahs before marriage and release of marital rights after marriage, in consideration of a property transfer just as in Merrill v. Fahs?"

[35]176 F.2d 233 (2nd Cir. 1949).

[36]*Id.* at 235.

[37]*Supra* note 5.

[38]*Supra* note 36.

[39]*Supra* note 33.

[40]178 F.2d 861, 865.

[41]*Quaere:* Could the Commissioner treat a transfer in satisfaction of marital rights be as a "sale or exchange"? In this connection, Mr. Douglas remarked:

"The Treasury Regulations recognize as tax free 'a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona

Harris case for the practicing attorney lies simply in the moral that, should he have occasion to handle a property settlement in the typical uncontested divorce, he should be sure to get the Chancery Court's "seal of approval."

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fide, at arm's length, and free from donative intent).' This transaction is not 'in the ordinary course of business' in any conventional sense. Few transactions between husband and wife ever would be; and those under the aegis of a divorce court are not. But if two partners on dissolution of the firm entered into a transaction of this character or if chancery did it for them, there would seem to be no doubt that the unscrambling of the business interests would satisfy the spirit of the Regulations. No reason is apparent why husband and wife should be under a heavier handicap absent a statute which brings all marital property settlements under the gift tax."

But *quaere,* if such a transfer were deemed a sale or exchange for purposes of the gift tax, would it be so treated for purposes of the income tax?

State Bar Section

AN ADDRESS*

John W. Kyle

We wish to extend to each of you our hearty congratulations upon your admission to the bar. You have not only been granted the privilege of practicing law in the courts of this State, but you have also become officers of the courts.

The practice of law has always been regarded as an honored professsion. Special preparation and training are required to enable a lawyer to obtain admission to practice his profession. For that reason the requirements for admission to the bar have been raised during our own time. As you enter the field of actual practice, you will appreciate more and more the need for constant study to enable you to represent properly the interests of your clients, and you will find that your general interest in the study of law as a basic social science will increase year by year. Lawyers have at all times played an important part in shaping the course of political thought and determining the rules of political conduct. Lawyers in a democratic society have unusual opportunities to acquire positions of leadership in the cultural life of the community; and in many matters of public interest lawyers, because of their legal training and experience, may wield controlling influence upon the course of public opinion.

We have been fortunate in having in Mississippi during every generation lawyers who in the practice of their profession have represented the highest standards of legal learning and scholarship, as well as professional integrity and moral character. I have known many eminent lawyers in the rural areas of Mississippi, outside the cities such as Jackson, Vicksburg and Meridian, during the last 30 years, who, if they had gone into the large cities of the North and East, would have attained distinction as members of the bar in any of those cities. And the bar of the City of Jackson has always included many members whose reputations have extended far beyond the borders of the State. The people of the State have always had need of good lawyers, and the people have always made use of their talents. And the need for well trained lawyers is greater today than ever before.

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*Remarks of Associate Justice John W. Kyle to Ole Miss Law School graduates upon the occasion of their admission to practice before the Supreme Court, January, 1951.

The law is a living manifestation of social and moral advancement, a code of regulations under which men's rights and men's duties are defined, so that men may live in peace with one another. Law provides the means whereby men may be persuaded, or if need be compelled, to respect the rights of their fellowman. And the law never becomes static. Constitutional theory changes very slowly. But the principles of legislation change more rapidly than many of us think; and this has been especially true during the era of industrial change through which we have passed during the last half century. New rules of conduct have been prescribed, for example, to meet the changing conditions of travel on the highways which have been brought about as a result of the introduction into common use of the automobile. New rules of safety have been prescribed to protect employees against the hazards of industrial accidents which occur as a result of the substitution of oil-burning or electrically propelled machines for the more common place hand tools in use a few years ago.

The records filed in this Court from week to week furnish ample evidence of the changes which have taken place in the every-day life of the masses of people during our own time. Lawyers nowaday are required to advise their clients on the law of contracts, the law of negligence and the law of property as applied to factual situations which were never dreamed of thirty years ago. Intricate problems of state and federal taxation and administrative regulations and controls by state and federal agencies are now laid before the practicing attorney for solution which the lawyers of yesterday would have been wholly unprepared to handle. The courts are called upon day by day to apply the principles of the common law and equity jurisdiction to the settlement of new kinds of legal controversies for which precedents are sometimes almost entirely lacking.

You begin the practice of law at a time when there is a great demand for the services of capable lawyers. We are living in an industrial age, an age in which the social and economic life of the people is being transformed as a result of the scientific discoveries and the mechanical inventions of the last forty years. Life for the masses of people is no longer based upon an agrarian economy but upon an industrialized economy; and business, both large and small, is faced with new problems, which arise out of new economic relationships between capital and labor, or are brought about as a result of the encroachment of governmental power upon the rights of the individual. And these problems cannot be handled without the advice and assistance of capable lawyers.

We are living in an age in which men are no longer disposed to accept the standards of life, or the political, social and economic ideals, or even the social connections of the past. We are living in an age in which material interests constitute the controlling influence in the lives of men.

We are living in a revolutionary age in which man's faith in himself and in his fellowman has been rudely shaken by the impact of economic forces which man appears at times to be unable to control, and by the impact of a Second World War, which threatened to destroy the entire social structure. We are living in an age when men achieve prosperity but do not find contentment, when men acquire riches, but do not find happiness.

The ideals of popular government and freedom for the common man have taken a deep hold upon the minds and hearts of the people of Mississippi. We believe that every man has a right to live and to think and to act as a free man. We believe that the right of the individual to be protected in the ownership and enjoyment of property, the right of the individual to choose his own associates, to work at any occupation for which he is fitted, without any unnecessary interference on the part of the government or any organized pressure group, are inalienable rights, which constitute a definite part of the American way of life. And we believe that these rights should not be abridged or destroyed by the state or by the federal government.

Lawyers, by virtue of their training and experience, have it within their power to help lead the fight to maintain these rights. Members of the bar, by their teachings and examples, can do much to inspire in the minds and hearts of the people themselves a new faith in what Carlyle called "the imperishable dignity of man" and a proper appreciation of moral values in a mechanized social order and in a world that is governed by physical and economic force.

After the Chief Justice discussed with me this assignment, I read in the daily newspaper a verse of Scripture taken from a chapter of the Book of Micah, which I had read many times before and which each of us might well accept as a measure of our own duty as members of the bar and as officers of the Court.

> "What doth God require of thee, but to do justly, and to love mercy (kindness), and to walk humbly with God."

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NOTES

ADVERSE POSSESSION OF FUTURE INTERESTS IN MISSISSIPPI

Introduction

Past decisions of the Mississippi Supreme Court throw considerable light on the problem of the general adverse possession statute[1] and its application to future estates. It shall be the purpose of this discourse to consider the present status of the Mississippi law in the light of similar statutes and decisions in other jurisdictions to determine the alternatives with which the Mississippi Court will be faced when new problems arise in this area.

From the outset it may be acknowledged that the doctrine of title by adverse possession has generally not been extended to future interests.[2] An understanding of the reason why it has not been thus extended can perhaps best be reached by considering the policy behind the doctrine. Tiffany says that it is the demerit of the true owner of property rather than the supposed merit of the adverse possessor that operates to debar the true owner.[3] On the other hand it is said that the rewarding of him who beneficially uses the land is the basis of the doctrine.[4] Ballentine[5] discounts both of these policy arguments and says that the great purpose is automatically to quiet long asserted titles, protect meritorious claims, and correct errors in conveyancing. While it is apparent that the authorities are not in accord as to what is the true policy, one can readily conclude that its general design is to demand a seasonable assertion of certain legal rights to property. From this consideration stems the real issue here involved: does the owner of a future interest in land possess such property rights and remedies as would bring him within the policy underlying the doctrine of adverse possession? Generally, the answer to this question has been in the negative, principally because the owner of such interest has no right of action prior to the time his right to possession begins.[6] If such owner does have a right of action before his possessory period begins, does that bring him within the general adverse possession statutes?

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[1] Miss. Code § 711 (1942).
[2] 3 Simes, Law of Future Interests §§ 778, 779 (1936).
[3] 2 Tiffany, Real Property § 500 (1920).
[4] Teisen, *Adverse Possession—Prescription*, 3 A.B.A.J. 126 (1917).
[5] Ballentine, *Title By Adverse Possession*, 32 Harv. L. Rev. 135 (1918).
[6] Note, 12 Miss. L.J. 258 (1939).

Statutory Protection of Future Interests

In many states, the owner of a future interest in land has either a statutory or common-law right to bring an action to remove a cloud on his title.[7] In Mississippi future estates in real property are recognized as being presently transmissible just as any other interest in land.[8] It would seem that if future interests, either contingent, vested or reversionary, are given practically the same recognition as present possessory extates and may be protected in the same manner, statutes of limitations should run against the owner thereof in the same manner as if the interest was possessory. Of course, this presupposes that the adverse possession be open and notorious so as to bring home notice to the owner. This would perhaps require greater notoriety than in normal cases. In favor of this view, it may be said that, if it be followed, titles may more readily be cleared. Marketability may be furthered since the adverse possessor may get an indefeasible title when he holds for the statutory period in spite of outstanding future interests.[9] Clearly this would be in accord with all the policy arguments already mentioned as underlying the doctrine of title by adverse possession.

Statutes Construed to be Mandatory

Iowa[10] and Nebraska[11] have definitely adopted the policy of having a statute authorizing the owner of a future interest to have a cloud on his title removed. Those jurisdictions construe such statutes to be mandatory instead of permissive.[12]

Statutes Construed As Permissive

On the other hand, the majority of the jurisdictions that have such statutes have construed them to be permissive rather than mandatory.[13] Not only do the statutes fail to start the period for adverse possession running, but they do not even bar a later action to quiet title. This is explained on the ground that the possessory action is the principal remedy to

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[7] 3 Simes, *op.cit. supra* note 2, ch. 39.

[8] Hamilton v. Jackson, 157 Miss. 284, 127 So. 302 (1930) (a contingent remainder may be conveyed). Yazoo & M.V. R.R. v. Traction Co., 100 Miss. 281, 56 So. 393 (1911) (a reversionary interest in land may be conveyed).

[9] 3 Simes, *op.cit. supra* note 2, § 778.

[10] Murray v. Quigley, 119 Iowa 6, 92 N.W. 869 (1902); Nevelier v. Foster, 186 Iowa 1307, 173 N.W. 879 (1919).

[11] Criswell v. Criswell, 101 Neb. 349, 163 N.W. 302 (1907).

[12] See notes 10 and 11 *supra*.

[13] 3 Simes, *op.cit. supra* note 2, § 779; Neeley v. Martin, 126 Ark 1, 189 S.W. 182 (1916); Webster v. Pittsburg, 78 Ohio St. 87, 84 N.E. 592 (1908); Armor v. Frey, 253 Mo. 447, 161 S.W. 829 (1913).

which the bill to quiet title is merely incidental, and that until the future interest becomes possessory it should not constitute laches for the owner to refrain from filing such a bill.[14]

The statutes for quieting title in Ohio and Missouri are almost indentical to those of Iowa and Nebraska, and yet the former have reached the result that the statutes are permissive, while the latter have construed them to be mandatory.[15] However, a more recent Nebraska case[16] appears to overrule former cases construing the statute to be mandatory and thus brings that jurisdiction into line with the majority view. This leaves Iowa alone holding the owner of a future interest to the vigilance of a possessory owner.

Adverse Possession As To Vested Versus Contingent Remainders

It would seem that some distinction might be made between vested and contingent interests as affected by adverse possession. In the case of the former, the owner need only wait for the passage of time before he will be in possession of his estate. His title is indefeasible and will be enjoyed in possession by him if he lives long enough. Often only the amount that he will take is uncertain while the right to an estate is sure to materialize. On the other hand, the contingent remainderman may not be *in esse* during a part of the period of the intervening estate. Further, even if he is *in esse,* there is the possibility that the contingencies provided for may or may not occur so as to give him any material assurance of a possessory estate. If he spends money to protect such an interest, it may be for the benefit of some other who may get the fee upon certain contingencies.

Apparently the Iowa Court made this distinction in the past. In the case of *Westcott v. Meeker*[16] the court held that contingent remaindermen who were to take as "heirs" of a life tenant had no such interest as could be barred under the statute of limitations. The Court distinguished the long line of cases in that state following *Murray v. Quigley,*[17] pointing out that they involved vested remainders. Yet in the earlier case of *Wenger v. Thompson*[18] remaindermen sought to establish title in land left to their mother for life, "then to her children then living," such interest being contingent upon their being alive at the life tenant's death. The court held that their claim was barred by the general statute of limitations. Subsequent to the Westcott case, *supra,* the Iowa Court returned to the view it had adopted in *Wenger v. Thompson* by holding in *Ward v. Meredith*[19] that contingent remaindermen were barred after failing seasonably to assert title to their interest. However, one important distinction was made by the

[14]See note 13 *supra.*
[15]3 Simes, *op.cit. supra* note 2, § 778.
[16]144 Iowa 311, 122 N.W. 964, 967 (1910).
[17]See note 10 *supra.*
[18]128 Iowa 756, 105 N.W. 333 (1905).
[19]186 Iowa 1108, 173 N.W. 246 (1919).

Court in the latter case. The Court pointed out that while the remainders there involved were contingent, they were not of that class where the remainderman is not *in esse* when the life tenancy is created. If the Iowa Court intended this as a distinction by which it would uphold both that line of cases following *Murray v. Quigley,*[20] involving vested remainders, and also the case of *Wescott v. Meeker,*[21] involving contingent remainders not *in esse,* then many of the cases in other jurisdictions, involving similiar types of contingent remainders may be reconciled with those of Iowa. This view was taken by way of dictum in the earlier Iowa case of *Blackett v. Ziegler,*[22] wherein property was held in trust for life, remainder to the life tenant's "heirs." The Court allowed an action by certain contingent remaindermen for the preservation of the estate and execution of the trust even though their interest was contingent upon surviving the life tenant. The Court said that the statute of limitations would not run against such remaindermen. Again remaindermen were defined as "heirs" and as such were unascertainable until the life tenant died. Thus it would seem that the Iowa Court does not so much distinguish between vested and contingent remainders as it does remaindermen *in esse* and those that cannot possibly be ascertained until the preceding estate ends.

The Supreme Court of Maryland makes a distinction between contingent remainders coupled with an interest and ordinary contingent remainders. In the case of *McCoy v. Poor*[23] appellants were remaindermen who would take the principal estate in trust if they survived their mother. At the same time their contingent interest was coupled with a right to income for their support during the life tenancy. The Court held that this present interest was sufficient to apply the doctrine of laches to them for failure to preserve their interest in the income, and that since they had such interest in the estate, they were likewise barred when the corpus of the estate, from which their income came, was conveyed by the trustee to appellees in fee and held for a period of 40 years. It was not stated whether a vested remainderman had sufficient interest without present income.

Privity Between Adverse Possessor and Ancestor of Remaindermen As a Bar to Remaindermen

While some courts refuse to hold that remaindermen, either vested or contingent, are barred solely because they fail to exercise a statutory privilege of removing clouds from their title, such courts will bar them

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[20]See note 10 *supra.*
[21]See note 16 *supra.*
[22]147 Iowa 167, 125 N.W. 874 (1910).
[23]56 Md. 197 (1881).

if there is some privity between the adverse possessor and the ancestor of the remaindermen. In the case of *Hargis v. Flescher Petroleum Co.*,[24] plaintiffs claimed property under one Amanda Hargis who attempted to leave land to her husband in fee simple by will contrary to a statute that allowed married women to dispose of realty only by deed or by exercise of a power of appointment. The will was void and plaintiffs as remaindermen were entitled to the estate after the death of Amanda's husband. Defendant was a remote grantee of the husband and interposed the defense of title by adverse possession. The court held that defendant's title was perfected by the husband's adverse possession under color of the void will even though during that time plaintiffs were remaindermen and not entitled to possession. The court said,

> "An heir is concluded by the conveyance or conduct of the ancestor, and any act of the ancestor affecting the rights of others must be treated and given effect as if it were the act of the heir."

The Court pointed out that where either the ancestor of the remainderman or the remainderman himself attempts to transfer title, either by will, deed or otherwise, and in some way fails to make a perfected transfer, and another under color of that faulty attempt holds adverse to those affected, then that matures the holders title during the period prescribed by adverse possession statutes.[25]

Section 1324, Mississippi Code (1942), and the Mississippi Cases

Section 1324, Mississippi Code (1942), appears to be very much like the statutes in other jurisdictions authorizing one out of possession to remove a cloud from his title. It provides,

> "When a person, not the rightful owner of any real estate, . . . shall assert any claim, or pretend to have any right or title thereto, which may cast doubt or suspicion on the title of the real owner, such real owner may file a bill in the Chancery Court to have such conveyance . . . or claim . . . cancelled, and such cloud, doubt or suspicion removed from said title, *whether such real owner be in possession or not . . .*" (Italics mine.)

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[24]231 Ky. 442, 21 S.W.2d 818 (1929).

[25]It was held that a void power of attorney signed by the ancestor who owned the fee which a remainderman later claimed had the same effect under similar circumstances. Brousom v. Thompson, 81 Ky. 387 (1883). Likewise, a void title bond executed by a married woman in derogation of statute, provided sufficient basis to start the statute of limitations running so as to bar remaindermen claiming under her after the statutory period had run. In Lewis v. Pleasants, 143 Ill. 271, 30 N.E. 323 (1892), it was held that where a life tenant bought the fee at a tax sale and sold it to one who held under that apparently good title for 20 years, such possessor had sufficient color of title to mature his title under the doctrine of adverse possession. In Nelson v. Davidson, 160 Ill. 254, 43 N.E. 361 (1895), a void guardian's deed had the same effect.

An Iowa statute provides,
"An action in the nature of that authorized in this chapter, may be brought by one having a reversionary interest, or by one either in or out of possession against another who claims title to real property."[26]

The Iowa Court and other courts construing similar statutes have held that this applies to future estates in land as well as present possessory estates.[27] The Mississippi case of *Fox v. Coon*[28] held that the owner of a reversionary interest may bring an action to remove a cloud from his title. However, that case did not construe any Mississippi statute. As was previously pointed out[29] reversionary, contingent, and vested interests are transferable property interests in Mississippi. In view of this recognition and protection given these future estates by the Mississippi Court, and in view of the analogy of Section 1324 to the statutes for quieting title in other states, it is probable that this Mississippi statute will be construed to give the owner of a future interest in land a right of action to remove a cloud from his title.

Whether the Mississippi Court will hold that this statute implies that this is mandatory upon the owner of such an estate remains to be seen. However, several closely analagous decisions support the inference, that the statute will be treated as permissive and as an enlargement of the rights of the landowner rather than mandatory and restrictive as was the Iowa statute treated by the Supreme Court of that State.

In the case of *Clark v. Foster,*[30] the Mississippi Court held that a statute fixing a two year period under which land sold by court order may be recovered had no application to remaindermen until their estate became possessory. In that case the testator devised land in trust to his daughter for life with the remainder to his minor grandchildren. The land was wrongfully sold during the life tenancy under a court order.

In the case of *Carter v. Moore,*[31] the testator had devised land to his widow for life with remainder to defendants. The land became delinquent and was sold for taxes to complainant who went into possession. The life tenant died. Two years later defendants sought by cross bill to confirm title to the land on the ground that the tax title was invalid and the property belonged to them as remaindermen. The Court held that the defendant remaindermen were not barred by Section 2288, Mississippi Code (1930),[32]

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[26]Murrary v. Quigley, *supra* note 10.
[27]See notes 10 and 11 *supra;* 3 SIMES, *op.cit. supra* note 2, § 778.
[28]64 Miss. 465, 1 So. 629 (1886).
[29]See note 8 *supra.*
[30]110 Miss. 543, 70 So. 583 (1916).
[31]183 Miss. 112, 183 So. 512 (1938).
[32]MISS. CODE § 2288 (1930) which provides for a three year limitation for recovering land by virtue of an invalid tax sale where the buyer goes into possession. See, MISS. CODE § 716 (1942).

notwithstanding actual occupation by complainant under tax title for three years after the period of redemption. The Court said that the three year limit within which the buyer's actual occupation matured his title to perfection was a "mere statute of limitations" which does not apply to remaindermen.

In the case of *Cox v. Richardson*,[33] the testator devised land to his widow for life with remainder to complainants. Defendant purchased the land at a defective tax sale. The court held that although the life tenant was barred, the three year limitation statute did not bar remaindermen until they were entitled to possession. The remaindermen clearly had vested interests during the life tenancy.

In considering these cases it should be remembered that the purpose of the adverse possession statutes is the quieting of titles. The tax title statute and the "title by court order" statute have the added purpose of giving security to those who purchase land by these means in order to induce individuals to make such purchases. Here then the Mississippi Supreme Court not only refused to extend the policy of the adverse possession statute to future interests in land, but it refused to do so when that policy was coupled with another policy equally or more important.

Conclusion

It can readily be seen then that the majority of the jurisdictions refuse to extend the doctrine of title by adverse possession to remaindermen, whether their interests be contingent or vested. Exceptions to this include those instances when the remainderman so acts as to be barred by laches or estoppel; or where the remainderman's ancestor has clouded the title in an adverse possessor so that the remainderman is bound by it as if he were the ancestor; or where the remainderman has some present right to income or support from the life estate of another, and lets such interest pass to another along with the purported fee without making protest. It has been noted that the majority of the states having statutes permitting remaindermen to quiet title to their interest have construed these as giving the remainderman additional rights instead of restricting him and holding him to the diligence of the owner of a possessory estate. Section 1324, Mississippi Code (1942), appears to be such a statute and probably will be construed to grant owners of future interests in land a right such as is given owners of similar interests in other states. While the Mississippi Court may well follow the exceptional cases holding that remaindermen are barred on the grounds that there is an estoppel, or that there is laches, or

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[33]186 Miss. 576, 191 So. 99 (1939).

that there is a present interest in the life estate for the remainderman, or that the color of title in the adverse possessor was created by an act of the remainderman's ancestor, it is more than probable that in the ordinary case the Court will follow the reasoning of the majority of the states by refusing to bar actions by owners of future interests until their estate becomes possessory. This conclusion is clearly substantiated by cases under the Mississippi tax title statute and under the "title by court order" statute. Thus neither the contingent nor vested remainder, nor the reversionary interest, would be subjected to the bar raised by the general statute of limitations.

Lonnie Ellis Griffith

DIVERSITY JURISDICTION AS AFFECTED BY ERIE v. TOMPKINS

The Federal Judiciary Act is practically coexistent with the Constitution and is clothed with almost a similar sanctity. The Act, for this reason, has not been susceptible of free amendment, and the desired alterations have been brought about by the court in the course of its decisions. Article III, Section 2, of the Constitution provides that the federal courts shall have jurisdiction of suits between citizens of different states. Section 34, of the Judiciary Act attempted to relate the various state judiciaries with the federal judiciaries when it stated that:

> The *laws* of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decisions in the trials at common law, in the courts of the United States, in cases where they apply. (Italics added).

An interpretation of this brief section with its unfortunate use of the unmodified word "laws" is still undetermined after one hundred-sixty years. The question as to what policy should govern its interpretation surges up with undiminished vigor. Few other subjects have been more prolific of legal writings. This note is an attempt to review the history of the controversy and bring it up to date.

Early Conception of Necessity for Federal Jurisdiction in Diversity Cases

In 1803 Mr. Justice Marshal justified the diversity jurisdiction on the ground that however impartial the state tribunals might be the constitution "entertained apprehensions on this subject," or viewed with indulgence the possible fears and apprehensions of non-resident suitors.[1] Although

[1]Bank of the United States v. Deveaux, 5 Cranch. 61, 87 (U.S. 1809).

this was the original theory the development of diversity jurisdiction was apparently accepted largely through fear of state legislation. It was thought that the local courts would generally be inadequate for the interests of business.[2] The extent of power of the federal courts in diversity cases was another aspect of the problem not clearly determined. Mr. Madison took the pleasantly optimistic view that Congress would return to the state courts the judicial power entrusted to the federal courts "when they find the tribunals of the states established on a good footing."[3]

The Development of Federal Common Law

The controversy was begun in 1842 by the decision in *Swift v. Tyson*.[4] Plaintiff, a resident of Maine, brought suit in New York on a bill of exchange that had been accepted in that state; defendant claimed that the decisions of the New York courts declared that a pre-existing debt was not a valuable consideration and that these decisions were controlling. The court applied the "general commercial law" that allowed a pre-existing debt as a valuable consideration, and held that, in a suit on a bill of exchange, the federal courts were not required to apply the common law of the states; and further held that the word "laws" in Section 34 of the Judiciary Act referred only to state statutes and not to state decisions. Mr. Justice Story summed up the doctrine of *Swift v. Tyson* by declaring that the decisions of the local tribunals would receive the attention and respect of the court but that they would not be allowed to furnish positive rules, or conclusive authority which would bind the judgment of the court.[5] The federal courts were obligated to follow state courts only in their interpretation of statutes governing title to land and other matters strictly local. Three years after *Swift v. Tyson* the court held in a case involving a Mississippi will that the mere construction of the will by the state supreme court was not a rule of decision for the supreme court unless it was a construction long acquiesced in. Mr. Justice McKinley dissented on the ground that the construction by the state court was binding; he thought that in power of judgment on this point the supreme court ought to be subordinate to that of the Mississippi court because this was a case governing title to land.[6]

The outstanding example of the opportunity for injustice under the doctrine of *Swift v. Tyson* is the case of *Black and White Taxicab and*

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[2]Frankfurter, *Distribution of Judicial Power Between Federal and State Courts*, 13 Corn. L.Q. 499, 520 (1928).
[3]*Ibid.* (quoting from Warren, *New Light on the History of the Federal Judiciary Act of* 1789, 37 Harv. L. Rev. 49, 66 (1923).
[4]16 Pet. 1 (U.S. 1842).
[5]*Ibid.* at 19.
[6]Lane v. Vick, 3 How. 464, 482 (U.S. 1845).

Transfer Company v. Brown and Yellow Taxicab and Transfer Company.[7] Plaintiff taxicab company, a Kentucky corporation, wished to secure from the Louisville and Nashville Railroad, also a Kentucky corporation, the exclusive privilege of soliciting passengers from its depot in a Kentucky city. Knowing that such contracts were invalid in Kentucky, plaintiff dissolved its Kentucky corporation and incorporated itself in Tennessee. The action was brought to restrain its Kentucky competitor from interfering with its exclusive rights at the depot. The decisions of the United States courts were held to be controlling for the reason "that the decisions of the Kentucky Court of Appeals . . . are contrary to the common law as generally understood and applied."[8] Mr. Justice Holmes dissented on the ground that the invalidity of such contracts was no less *law* merely because it had not been embodied in a statute as it might properly have been. His famous statement on the subject was that there is no "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute."[9]

The *Taxicab* case is one of manufactured diversity and the doctrine of *Swift v. Tyson* was probably flexible enough to allow the court to examine the substance of the transaction and modify the "federal rule" so that Kentucky law could have been followed.[10] Perhaps then, the *Taxicab* case is an a typical application of *Swift v. Tyson* and a fairer result could have been reached by a more flexible application of the doctrine without impairing it. Nevertheless, it supports Mr. Justice Frankfurter's analysis that corporate litigation is the key to diversity problems. He continues to say that legal metaphysics about corporate citizenship has produced a "brood of incoherent legal fictions" on corporate status which has defeated the domestic policies of the states, and has overburdened the federal courts with controversies which best come within state political power.[11]

Subsequent Reversal of the Federal Common Law Doctrine

In 1938 Mr. Justice Brandeis wrote the highly controversial opinion in *Erie Railroad Co. v. Tompkins.*[12] Tompkins, a Pennsylvania citizen, was injured on the right of way of the defendant in that state. Suit was brought in the federal district court in New York, that being the defendant's state of incorporation. Defendant claimed that in the absence of state and federal statutes the law as declared by the highest state court is controlling and that Pennsylvania courts had held that a user of a railroad right of

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[7]276 U.S. 518 (1928).
[8]*Ibid.* at 528.
[9]*Ibid.* at 533.
[10]Keefe, Gilhooley, Bailey, and Day, *Weary Erie,* 34 Corn. L.Q. 494, 503 (1949).
[11]See note 2 *supra.*
[12]304 U.S. 64 (1938).

way was a trespasser. Plaintiff claimed that since there was no state statute on the issue the railroad's duty and liability were to be determined in federal court as a matter of general law. The supreme court emphatically overruled *Swift v. Tyson* and held that the Pennsylvania decisions were controlling. "Experience in applying the [*Swift v. Tyson*] doctrine . . . revealed its defects, political and social." The court went further than a mere construction of Section 34 of the Judiciary Act and held that the course formerly pursued was unconstitutional since equal protection of the laws is impossible where the accident of diversity of citizenship brings in a different and often contrary set of laws. Mr. Justice Reed dissented in part on the charge of unconstitutionality of the doctrine. Such is the import of this decision that it has evoked from Judge Learned Hand the comment, "I don't suppose a civil appeal can now be argued to us without counsel sooner or later quoting large portions of *Erie Railroad Co. v. Tompkins.*"[13]

Prior to the *Erie* decision federal courts were applying the doctrine of *Swift v. Tyson* in matters of substantive law, while at the same time they were following state law in matters of procedure, pursuant to the provisions of the Conformity Act.[14] Then in 1938, shortly before its decision in the *Erie* case, the court promulgated the Federal Rules of Civil Procedure.[15] The Rules brought about a complete reversal in matters of procedure and *Erie,* following close behind, did the same for matters of substance.[16] The rule of thumb now was that if the matter was substantive then state law controlled under *Erie* doctrine, while if the matter was procedural the Rules controlled. Assuming the reliability of the substance-procedure test, the next question was as to the limits federal courts must go in determining the substantive law of a state. It is probably safe to state that *Erie* and its related decisions do not require federal courts to follow rules of stare decisis which the state courts are not required to follow, or to enter into speculation as to what the state courts are likely to do in a similar case.[17] At the same time the court went rather far afield in search of the substantive law of the forum state when it stated that a federal court was not free to reject the state rule merely because it had not received the sanction of the highest state court; and that federal courts must ascertain

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[13]Quoted by Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins,* 5 YALE L. J. 267, 269 (1946).
[14]17 STAT. 197, 28 U.S.C. § 724 (1872).
[15]48 STAT. 1064, 28 U.S.C. § 723c (1934).
[16]Merrigan, *Erie to York to Ragan—A Triple Play on the Federal Rules,* 3 VANDERBILT L. REV. 711 (June 1950).
[17]Parker, *Erie v. Tompkins in Retrospect: An Analysis of Its Proper Area and Limits,* 3 A.B.A.J. 19 (Jan. 1949).

what the state law is from all available data, regardless of its inferiority as compared to other law.[18]

Extension of the Erie Doctrine

In 1945, *Guaranty Trust Co. v. York*,[19] extended the *Erie* doctrine to include state statutes governing suits in equity. The suit, a class action, was based on an alleged breach of trust by Guaranty in assenting to an exchange offer and not disclosing its self-interest. Federal jurisdiction was based solely on diversity of citizenship. The district court gave a summary judgment for the petitioner and the court of appeals reversed on the ground that federal courts did not have to apply state statutes of limitation in federal equity cases,[20] the theory being that limitations were a matter of procedure and that the federal "equitable remedial rights" applied instead of the *Erie* rule. In reversing the court of appeals Mr. Justice Frankfurter for the court declared that the nub of the policy underlying the *Erie* case is that the accident of diversity of citizenship with suit in federal court instead of state court "a block away" should not lead to a *substantially different result*.[21] With this decision a new test was evolved to try whether a state statute was substantive or procedural—the different-result test. "Thus were federal courts charged to conform completely to state law and the standard of conformity was to be uniformity of result with state courts."[22]

The following year, the court, by Mr. Justice Frankfurter, again extended the *Erie* doctrine in *Angel v. Bullington*,[23] this time apparently to encompass the adjective law of a state. The suit was brought by a citizen of Virginia in North Carolina for a deficiency judgment against a citizen of North Carolina. Defendant demurred on the ground that a North Carolina statute on deficiency judgments precluded such recovery.[24] The North Carolina Supreme Court overruled the lower court and sustained the demurrer. The limitation was held to be upon the jurisdiction of the court; and the court said, "The statute operates upon the adjective law of the State, which pertains to practice and procedure. . . ."[25] Plaintiff did not

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[18]West v. A.T. & T. Co., 311 U.S. 223 (1940). Mr. Justice Stone indicated that inferior state courts were within the limits of available data. See also, Harnett and Thornton, *Precedent in the Erie-Tompkins Manner*, 24 N.Y.U.L.Q. 770, 782-798 (1949).

[19]326 U.S. 99 (1945).

[20]143 F.2d 503, 528 (2nd Cir. 1944).

[21]See note 19 *supra*.

[22]Denny, *Substance, Procedure and Uniformity—Recent Extensions of Guaranty Trust Co. v. York*, 38 Geo. L.J. 115, 118 (1949).

[23]330 U.S. 183 (1946).

[24]Pub. L. 1933, c. 36; Michie's Code § 2593 (f).

[25]220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941).

prosecute an appeal to the United States Supreme Court, but filed a new suit in the federal district court; and an appeal was subsequently taken to the supreme court. The supreme court decision dismissing the complaint was based on two points: (1) res judicata; all issues having been presented in the state court the plaintiff "cannot begin all over again in an action involving the same issues before another forum in the same state"; and (2) the statute being declarative of state law and policy, it must control under *Erie* doctrine, which is another application of the different-result rule.

The opinion in the above case has been misinterpreted more than once. On appeal from the district court the court of appeals held that the decision rested on res judicata and that the reference to *Erie* doctrine was obiter.[26] And the emminent jurist, Judge Parker, also disposed of the second ground as being mentioned merely *arguendo*.[27] This misunderstanding was corrected when the supreme court in *Woods v. Interstate Realty Co.*[28] declared that *Angel v. Bullington* was a multipoint decision and that neither ground could be considered *obiter dictum*.

Recent Decisions

In 1949 the supreme court handed down three consecutive decisions which have elicited considerable criticism as being infringements upon the Federal Rules.[29] The first of the three, *Ragan v. Merchants Transfer and Warehouse Co., Inc.*,[30] is charged with doing violence to Rule 3 which provides that a civil action is commenced by *filing a complaint* with the court. A tort action was brought in a district court of Kansas solely on diversity of citizenship; respondent pleaded a two year Kansas statute of limitations which declared that an action was commenced upon *service of process*.[31] The two years expired between the filing of the complaint and service of process. Petitioner claimed that filing of the complaint tolled the statute; the district court struck the defense and gave petitioner a verdict. The court of appeals reversed on the ground that the service of process was an integral part of the Kansas statute of limitations, citing *Guaranty v. York*. The supreme court in affirming the court of appeals held that since the cause of action is created by local law, the local law must be the measure of it; and that to give the cause of action longer life in the federal court than it would have had in the state court would add something to the cause of action.

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[26]Woods v. Interstate Realty Co., 170 F.2d 694 (5 Cir. 1948).
[27]See note 17 *supra*.
[28]337 U.S. 535 (1949).
[29]See note 17 *supra*.
[30]227 U.S. 530 (1949).
[31]Kan. Gen. Stats. 1935, §§ 60-306.

It is alleged that here is an instance of conflict between Rule 3 and a state statute and that the court by its decision has removed Rule 3 from diversity cases.[32]

In *Woods v. Interstate Realty Co.*,[33] the second of the three cases, a foreign corporation filed suit for commission fees in the federal court for the Northern District of Mississippi with jurisdiction based upon diversity of citizenship. The complainant corporation had not complied with Mississippi Code Section 5319 which requires foreign corporations doing business in the state to designate an agent for process and provides that "any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this State." The district court held that under Mississippi law the contract was void and dismissed the suit. The Court of Appeals, Fifth Circuit, held that the contract was not void but merely unenforcible in Mississippi courts, and based its decision on the pre-*Erie* case of *Lupton's Sons v. Automobile Club of America*,[34] which was cited as obsolete in *Angel v. Bullington*. On rehearing the court of appeals held that *Angel v. Bullington* was decided on res judicata and did not overrule *Lupton's Sons*.

The supreme court reversed the court of appeals and affirmed the district court, emphasizing that the *Angel* case overruled *Lupton's Sons* because it was decided on the basis of *Erie* doctrine *as well as* res judicata. Rule 17b, which provides that a corporation's power to sue shall be determined by the law of the state of incorporation, is thereby apparently delimited from diversity cases.

The net effect of the decision in the *Woods* case is that in diversity actions a foreign corporation's capacity to sue must now be determined by the law of the state in which it seeks to sue, and not in accordance with the laws of the state of its incorporation.[35]

Mr. Justice Jackson wrote a vigorous dissent to the *Woods* decision on the ground that the Mississippi statute does not intend to invalidate such contracts, but merely forecloses the courts of the state. The dissent adds that the supreme court construction is "harsh, capricious and vindicative," and most absurdly the benefits go to enrich the debtor and not the offended state.

Cohen v. Beneficial Industrial Loan Corporation,[36] the last of the three consecutive cases, was a stockholder's derivative action begun in 1943 solely on diversity of citizenship by one who held only .0125% of the out-

[32]See note 17 *supra*.
[33]See note 28 *supra*.
[34]225 U.S. 489 (1912).
[35]Merrigan, *op. cit. supra* note 16, at 721.
[36]337 U.S. 541 (1949).

standing stock. In 1945, after various proceedings had taken place, the forum state, New Jersey, passed a law requiring that in stockholder's derivative suits all complainants holding less than 5% of the stock or less than $50,000 in assets must post a bond or security for the costs and attorney's fees of the corporation if complainant fails to make good his complaint. The statute was to be retroactive and purported to stay all pending proceedings until the condition had been met.[37] The district court was of the opinion that the state enactment was not applicable to such a proceeding when pending in a federal court.[38] The court of appeals reversed[39] and the supreme court affirmed, holding that the statute was not merely a regulation of procedure but that it created a new liability where none existed before. The court found no conflict between the application of the New Jersey statute and Rule 23 which governs procedure in shareholders' actions. Mr. Justice Douglas, with whom Mr. Justice Frankfurter concurred, dissented on the ground that the measure of the cause of action is the claim which the corporation has against the alleged wrongdoers. The statute is purely procedural and Rule 23 should control. State procedure regulations do not fall under the *Erie* doctrine unless "they define, qualify or delimit the cause of action or otherwise relate to it." Mr. Justice Rutledge also dissented in all three decisions. In an interesting note on page 560 of the report, he pointed out that the *Erie* case was decided on the basis of Pennsylvania law, that being the situs of the cause; but the action was brought by Tompkins in New York, the domicile of the corporate defendant. No attempt was made to decide the case on the basis of what a state court would have done with the same cause or if a different result would have been reached. It was only after Mr. Justice Brandeis retired from the bench that this test came into practice.

An interesting situation arises when there is an inversion of the usual *Erie* type case; that is, where a state court is enforcing federal law. *Brown v. Western Railway of Alabama*[40] was a suit by a railroad employee in the Georgia state court under the *Federal Employer's Liability Act*. The trial court held that the complaint was insufficient on the ground that state practice required pleading to be construed most strongly against the pleader.[41] The Supreme Court of Georgia held that a federal right cannot be defeated by forms of local practice and that complainant stated a cause of action under *F.E.L.A.*: "Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws." In the U.S. Supreme Court Justices Frankfurter and Jackson dissented on the ground that state law governed the manner of pleading

[37]N.J. Laws 1945, c. 131.
[38]7 F.R.D. 352 (D.C.N.J. 1947).
[39]170 F.2d 44 (3 Cir. 1948).
[40]338 U.S. 294 (1949).
[41]77 Ga. App. 780 (1948).

negligence under the Act—Georgia rules of general applicability, "however finicky," should be enforced so long as they do not qualify the basis of recovery under *F.E.L.A.*

Conclusion

There are many writers who advocate a return to *Swift v. Tyson* as the only solution for the diversity problem. This, however, is an idle argument for "the contrary doctrine of the *Erie* case is now so deeply imbedded in our jurisprudence that it probably could not be overruled."[42]

How, then, shall the *Erie* doctrine be applied and what are its limits? The only definite bounds for *Erie* are diversity of citizenship cases; it cannot be applied conceivably in any other type. What of procedure and substance? It is true that the terms overlap and that there is no satisfactory degree of difference between them; nevertheless, it is apparent that federal courts will continue to make the distinction between matters of substance and procedure even though it may be on an inarticulate level. The different-result test is fairly easy to apply and probably will continue to be the one most generally used. The apparent simplicity of the test has a strong appeal and presumably it is a reliable test of whether a state practice or regulation is a matter of substance or merely procedural.

Perhaps the whole controversy is a case of more smoke than fire as might be inferred from Judge Parker's statement:[43]

> Experience has demonstrated that the change effected has been neither very great nor very important. It has hampered the federal courts to some extent in administering justice in diversity cases; but it has not resulted in the great harm that some of us feared. . . . The controversy assumes importance chiefly as a matter of history or legal theory.

Lester F. Sumners

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[42]Parker, *supra* note 17, at 21.
[43]*Ibid.* at 19.

RECENT DECISIONS

Conflict of Laws—Statute of Limitations Under Federal Tort Claims Act Controlling Over Statute of Limitation Provision of Wrongful Death Statute

Plaintiff brought action as administrator of his wife's estate under Federal Tort Claims Act[1] for wrongful death. The suit was dismissed in the District Court for the District of Columbia on motion of the United States for lack of jurisdiction since the suit was brought more than one year but less than two years after her death. The statute of limitation for death by wrongful act in the District is one year,[2] while that set forth in the Federal Tort Claims Act is two years.[3] Held: Two year provision in the Tort Claims Act is controlling. *Young v. United States,* 184 F.2d 587 (D.C. Cir. 1950).

The general rule is that courts will be governed by the law of the forum in determining periods of limitation applicable to actions at law.[4] Contra to this is the case of *Lewis v. Reconstruction Finance Corporation*[5] dealing with facts very similar to those in the principal case. There Lewis sued the R.F.C. under the wrongful death act of Nebraska[6] which provided for a two year period of limitation. The case was heard in the District of Columbia having a one year period of limitation.[7] The two year period of the Nebraska statute was held controlling. The principal grounds for this holding were (1) "the limitation laid down by the law of the state where the fatal injury occurred should govern unless the public policy of the forum is clearly opposed,"[8] and (2) an insurmountable obstacle to the application of the local limitation was that the District of Columbia statute[9] is specifically confined to deaths resulting from injuries suffered within the District.[10]

In the instant case the court stated that in actions under the Federal Tort Claims Act,[11] only one jurisdiction is involved—the United States. "It is not a question of a choice between conflicting statutes of limitation; the problem is to ascertain the effect of the Act of Congress and to carry out its intent."[12] After examining the

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[1]28 U.S.C. § 1346 (b) (1948).

[2]16 D.C. Code § 1202 (1940).

[3]"A tort claim against the United States shall be forever barred, unless action is begun thereon within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later . . ." 28 U.S.C. § 2401 (1948).

[4]Sommer v. Nakdimen, 97 F.2d 715 (8th Cir., 1938); Sanderson v. Postal Life Insurance Company of New York, 87 F.2d 58 (10th Cir., 1937); Van Dyke v. Parker, 83 F.2d 35 (9th Cir., 1936); "A recovery under the death statute of the place of wrong cannot be had in any state after the time fixed in the statute for bringing an action has elapsed." Restatement, Conflict of Laws § 397 (1934); 26 Va. L. Rev. 1062 (1940); See also note 79 U. of Pa. L. Rev. 1112 (1949).

[5]177 F.2d 654 (D.C. Cir., 1949).

[6]Neb. Rev. Stat. § 30-809 (1943).

[7]See note 2 *supra.*

[8]177 F.2d 654, 656.

[9]16 D.C. Code § 1201 (1940).

[10]Whenever by an injury done or happening within the District of Columbia the death of a person shall be caused by the wrongful act, neglect, or default of any person.

[11]See note 1 *supra.*

[12]Capital Transit Company v. United States, 183 F.2d 825 (D.C. Cir., 1950), cited in principal case at p. 589.

House Committee Report[13] the court reasoned that the intent of the legislature was that the two year period of the Tort Claims Act would be controlling.

It may be argued that in this type of action two rights granted by statute are necessary: (1) the right to recover for wrongful death,[14] and (2) the right to recover from the sovereign or state,[15] both of these rights being necessary to effect recovery. The dissent states that a right may not survive the statute creating it.[16]

The majority opinion holds that the sovereign having given its permission to be sued, this right will continue until ended by the provisions of the statute granting it. This is a right created by statute and the statutory provision as to its termination determines when the right ceases to exist.[17]

J. B. French

Constitutional Law—Police Power—Free Speech—Prior Restraint—Subsequent Restraint

A municipality set up a licensing system to control the use of its streets and parks for public religious services. The ordinance was construed by the court of appeals to sanction the right of an administrative official to revoke or refuse a license if he found the person was likely to "ridicule" or "denounce" religion. After revocation of a prior license and refusal of a new one, arrest was made for speaking without a license. Held: Ordinance[1] invalid as vesting in an administrative official restraining control over right to speak without providing appropriate standards to guide his action. *Kunz v. People of State of New York,* 71 Sup. Ct. 312 (U.S. 1951).

In a companion opinion,[2] rendered the same day, *Feiner v. People of State of New York,*[3] which did not involve a license, petitioner was arrested for disorderly conduct[4]

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[13]H. R. Rep. No. 1754, 80th Cong., 2d Sess. (1948).

[14]Osburn v. Bank of U.S., 22 U.S. 738 (1824); Prosser, Handbook on the Law of Torts § 108 p. 1063 (1941).

[15]Moran v. Harrison, 91 F.2d 310 (D.C. Cir., 1937), *cert. denied,* 302 U.S. 740 (1938); Young v. Hoage, 90 F.2d 395 (D.C. Cir., 1937); William Danzer and Company v. Gulf & Ship Island R.R., 268 U.S. 733 (1925); The Harrisburg, 119 U.S. 199 (1886); 34 Am. Jur., Limitation of Actions §§ 16, 17.

[16]"Statute of Limitations at Forum. The limit of time in the death statute of the forum may be interpreted as a statute of limitations for all actions for death irrespective of the place of wrong, as well as a statute of limiting the existence of rights created by the statute . . . and in that case the suit must be brought within the time limited in that statute, as well as within the time limited in the statute of the place of injury." Restatement, Conflict of Laws, § 397 comment (b) (1934).

[17]Burkhardt v. United States, 165 F.2d 869 (4th Cir., 1947); Webster v. Clodfelter, 130 F.2d 434 (D.C. Cir., 1942). *cert. denied,* 317 U.S. 689 (1942).

[1]Adm. Code of City of N.Y., § 435-7.0, Ch. 10, this ordinance previously construed in People v. Smith, 263 N.Y. 255, 188 N.E. 745 (1933), and appeal dismissed for want of federal question in Smith v. People of State of New York, 292 U.S. 606 (1934); further construed by court of appeals to require initial request of permit be granted, People v. Kunz, 300 N.Y. 276, 90 N.E.2d 457 (1949).

[2]Mr. Justice Frankfurter concurring in both decisions, as well as in two other decisions decided the same day, Niemotko v. State of Maryland, Kelley v. State of Maryland, Kunz v. The People of the State of New York, Feiner v. People of the State of New York, 71 Sup. Ct. 328 (U.S. 1951).

[3]71 Sup. Ct. 303 (U.S. 1951).

[4]Substantially the same as common law breach of the peace, Penal Law New York, § 722, sbdv. 1.

while speaking in a negro area. The lower court found that arrest was made to prevent a breach of the peace, and the Supreme Court held that restraint was proper when there was a clear and present danger of riot, disorder, interference with traffic upon public streets, or other immediate threat to public safety, and that arrest under the circumstances of this case was not a denial of the right of free speech.[5]

All the liberties insured to the people by the first amendment have a preferred position in our basic scheme.[6] It follows that a constitutional doctrine developed in cases involving any one of these liberties has significance for the whole group.[7] In considering the problem presented by the instant cases—how to reconcile the interest in allowing free communication of ideas in public places with the protection of the public peace and with the primary uses of streets and parks—it is found that the cases enunciate several applications of the constitutional right. The first amendment liberties include the use of the public streets for the communication of ideas,[8] and thus, the inconvenience to a municipality or the public resulting from distribution of pamphlets furnishes no justification for suppression of communications.[9] Prevention of crime and the assurance of privacy in an industrial area where many worked on night shifts, and had to obtain their sleep by day, were held insufficient to justify an ordinance which forbade the ringing of doorbells and delivering pamphlets.[10] The imposition of nondiscriminatory taxes on solicitation has introduced other issues,[11] and those decisions which involve statutes regulating various means of communication by permit present still further questions involving the interpretation of the constitutional rights.[12]

The early view in respect to municipal control is shown in *Davis v. Commonwealth of Massachusetts,* where the private ownership theory as applied to public property is

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[5]Niemotko v. State of Maryland, Kelley v. State of Maryland, 71 Sup. Ct. 325 (U.S. 1951), decided on same day as the instant cases. "Where there is no evidence of disorder, threats of violence or riot at time of arrest of defendants, who were members of religious group known as Jehovah's Witnesses, on charge of disorderly conduct, and only basis for arrest was that defendants were using public park without permit from city officials, although there was no statute, or ordinance prohibiting use of park without a permit, defendants' conviction was in violation of equal protection of laws, and could not be justified on ground that city officials had designated the park as a sanctuary for peace and quiet, in absence of showing that defendants' conduct created a disturbance."

[6]Prince v. Massachusetts, 321 U.S. 158 (1943), where the court said, ". . . it may be doubted that any of the great liberties . . . can be given higher position. . . . All are given preferred position;" citing Schneider v. State, 308 U.S. 147 (1939), and Cantwell v. Connecticut, 310 U.S. 296 (1939).

[7]Lovell v. Griffin, 303 U.S. 444 (1938); Near v. Minnesota, 283 U.S. 697 (1930); Grosjean v. American Press Co., 297 U.S. 233 (1935); Hughes v. California, 339 U.S. 460 (1949).

[8]Lovell v. Griffin, *supra* note 7.

[9]Schneider v. State, *supra* note 6.

[10]Martin v. City of Struthers, 319 U.S. 141 (1942) (except where house owner denies right).

[11]Jones v. City of Opelika, 319 U.S. 103 (1942), vacating 316 U.S. 548 (1941); Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105 (1942); Follett v. Town of McCormick, 321 U.S. 573 (1943).

[12]Lovell v. Griffin, *supra* note 7; Hague v. C.I.O., 307 U.S. 496 (1938); Schneider v. State, *supra* note 6; Jamison v. State of Texas, 318 U.S. 413 (1942); Cantwell v. Connecticut, 310 U.S. 296 (1939); Marsh v. State of Alabama, 326 U.S. 501 (1945); Saia v. People of State of New York, 334 U.S. 558 (1947); Kovacs v. Cooper, 336 U.S. 77 (1948).

recognized.[13] This idea has been followed by the interpretation that public property is held in trust for the use of all citizens without discrimination.[14] This principle recognizes the power of the state or municipality to regulate, but limits such regulations by reasonable restrictions.[15]

The question then arises: Does the power recognized in a municipality reasonably to regulate in the interest of the public, also include the power to forbid in advance certain means of communication? The alternative position would require the official to allow the communication until a "clear and present danger" was presented.[16] Prior restraint is generally considered to involve permit regulation, and was forbidden at common law.[17] Statutes and ordinances which include sufficient standards have been held valid.[18] Such validity is based on several principles.[19] The danger of any control by the sovereign is that such regulations may be arbitrary.[20] At some point the conflicting interest must be correlated.

The justification for the existence of the prior restraint doctrine has been questioned.[21] The theory is that because the regulation takes the form of a previous restraint, it can have no independent significance as a test of invalidity unless the various forms of prior restraint differ from subsequent restraint.[22]

The types of restriction which the courts have generally considered as prior restraint have involved injunctions, permit requirements, license taxes, and registration.[23] This position has been influenced by the desire to prevent excessive control over the dissemination of ideas, and the opportunity for arbitrary and discriminatory regulation. It has been argued that prior restraint is no more likely to result in suppression of freedom than subsequent restraint.[24] The general theory is that the effect will be

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[13]Davis v. Commonwealth of Massachusetts, 167 U.S. 43 (1897). ". . . to forbid speaking in a highway . . . is no more an infringement of the rights . . . than for the owner of a private house to forbid it in his house;" unanimous decision which ruled that the permit was aimed at protection of public interest and not free speech.

[14]Hague v. C.I.O., *supra* note 12, ". . . wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public. . . ."

[15]Hague v. C.I.O., *supra* note 12; Kunz v. People of City of New York, *supra* note 2; compare with Prince v. Massachusetts, *supra* note 6; Kovacs v. Cooper, *supra* note 12.

[16]Fenier v. People of State of New York, *supra* note 3; Schenek v. United States, 249 U.S. 47 (1919), rule reformulated in Bridges v. California, 314 U.S. 252 (1941).

[17]Note, *Previous Restraint Upon Free Speech*, 31 Col. L. Rev. 1148 (1931); See Chafee, Free Speech in the United States, C. IV, § iv, (1st Ed. 1941).

[18]Prince v. Massachusetts, *supra* note 6; Kovacs v. Cooper, *supra* note 12; Cox v. State of New Hampshire, 312 U.S. 569 (1940).

[19]See Chafee, Free Speech in the United States, 422, (1st Ed. 1941); Mr. Justice Jackson adopts this reasoning in dissent in *Kunz* Case.

[20]Niemotko v. State of Maryland, *supra* note 5; Kelley v. State of Maryland, *supra* note 5.

[21]Note. *Prior Restraint—A Test of Invalidity in Free Speech Cases,* 49 Col. L. Rev. 1001 (1949).

[22]Position of Mr. Justice Jackson in dissent in *Kunz* Case; See Note, *Impact of the First Amendment on Federal Legislation Affecting "Subversive" Movements,"* 49 Col. L. Rev. 363 (1949).

[23]Near v. State of Minnesota, *supra* note 7; Cantwell v. Connecticut, *supra* note 6; Follett v. Town of McCormick, *supra* note 11; Saia v. New York, *supra* note 12; Thomas v. Collins, 323 U.S. 516 (1944).

[24]Position of Mr. Justice Jackson in Dissent in *Kunz* Case; See Note 21 *supra.*

the same in both instances, whether measured by prior or subsequent restraint.[25] Prior restraint need not be arbitrary or necessarily for the purpose of restricting "free speech"; it may be used constitutionally. The test to be applied in this instance is the same which is applied to federal statutes.[26] This test determines the constitutionality of the statute by the actual effect, and does not strike it down until it has been proved unconstitutional in its *result.*

The majority of the court in the instant cases have followed the principles of those previous decisions on the issues involved, but it is also true that certain members have shown a strong tendency toward adoption of different rules.[27] It is further evident that as a result of the complexity of the problems presented to a municipality that some control must be exercised in advance.[28] While it is true that the "sufficient standards" doctrine might be replaced by the "actual effect" of the prior restraint, it is to be remembered that the court should be reluctant to allow the sovereign to regulate in its discretion the liberty of its citizens. It is no justification for the abolishment of the "sufficient standards" doctrine as applied to prior restraint, to say that it may be measured by the same standards as that applied to subsequent restraint. There should be some controlling influence on the administrative official in advance. Consideration must be given to the particular factual situations. Consideration must be given to: (1) what interest is deemed to be sufficient to require such regulations, (2) the method by which such regulation is to be made, (3) the type of communication regulated, (4) the conditions under which the communication takes place.[29]

Clinton Gay Herring

Corporations—Jurisdiction of Actions Against a Two-State Corporation in Federal Court

Plaintiff, a citizen of New Jersey, brought action against the defendant railroad, incorporated in both New Jersey and New York, in the Federal District Court based on diversity of citizenship. Defendant's motion to dismiss on the grounds that there was no diversity was sustained by the lower court.[1] Held: The federal court has jurisdiction on the basis of diversity of citizenship. *Gavin v. Hudson and Manhattan Railroad,* 185 F.2d 104 (3 Cir., 1950).

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[25]Terminiello v. Chicago, 337 U.S. 1 (1948), distinguished in concurring opinion in all styled cases by Frankfurter, *supra* note 2; compare Saia v. New York, *supra* note 12, and Kovacs v. Cooper, *supra* note 12 in this light.

[26]Dissent in Kunz v. People of State of New York, *supra* note 1; rule adopted in regard to federal statutes, United States v. Petrillo, 332 U.S. 1 (1946).

[27]Feiner v. People of State of New York, *supra* note 3, with Mr. Justice Black dissenting on construction of factual situations, in believing that action by police was arbitrary and for suppression purposes and not in pursuit of "clear and present danger." Messers. Justice Douglas and Minton, also fearing arbitrary action; Mr. Justice Jackson dissenting in Kunz v. People of State of New York, *supra* note 2.

[28]See Note 23 *supra.*

[29]Russell, Authority and the Individual 25 (1st Ed. 1942), "The problem, like all those with which we are concerned, is one of balance; too little liberty brings stagnation, and too much brings chaos."

[1]90 F. Supp. 172 (D.C.N.J. 1950).

The concept of corporate citizenship is a fiction.[2] In the past there have been three principal theories under which multi-state corporations have been subject to federal jurisdiction,[3] (1) when the plaintiff leaves the state of his citizenship and brings suit against a corporation in another state in which the defendant is incorporated;[4] (2) when the plaintiff brings suit in the state where the cause of action arose;[5] and (3) when the plaintiff brings suit against the corporation in the first state in which it was incorporated, such first state of incorporation determining the citizenship of the corporation.[6]

While the instant case did not fit into any of these categories the court held, nevertheless, that there was federal jurisdiction based on diversity of citizenship.

To justify this decision the court pointed out that fictions were valuable tools so long as they achieved an equitable result,[7] but "if a legal rule fails to satisfy the untechnical requirements of ordinary common sense the premises behind the rule had better be carefully examined."[8] The court then turned to a minute examination of the above three premises pointing out that they could be carried to absurd extremes, thereby defeating the rights of the parties whom they were designed to protect. It would seem that the court felt that the scope of the federal courts should be extended in a practical direction where jurisdiction over multi-state corporations is involved.[9]

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[2]Bunn, Jurisdiction and Practice of the Courts of the United States, p.43 (5th ed. 1949): "The Constitution and the Act of Congress speak of actions between citizens, and corporations are nowhere mentioned, and perhaps were not thought of when the Constitution was adopted"; Dobie, Federal Jurisdiction and Procedure § 65 (1928).

[3]Railway Express Agency Inc. v. Virginia, 282 U.S. 440 (1931); Baltimore and Ohio Ry. v. City of Parkersburg, 268 U.S. 35 (1925); Patch v. Wabash Ry., 207 U.S. 277 (1907); St. Joseph and G.I. Ry. v. Steele, 167 U.S. 659 (1897) (allegation that plaintiff was a corporation of Nebraska and Kansas and that defendant was citizen of Kansas held in effect an allegation that the plaintiff and the defendant were both citizens of Kansas); 23 Am. Jur., Foreign Corp. § 134.

[4]Pennsylvania v. Alton & Terre Haute Ry., 118 U.S. 290 (1886); Muller v. Dows, 94 U.S. 444 (1877); Boston & M. R.R. v. Breslin, 80 F.2d 749 (1st Cir., 1935), *cert. denied,* 297 U.S. 715 (1936); Boston & M. R.R. v. Hurd, 108 Fed. 116 (1st Cir., 1901), *cert. denied,* 184 U.S. 700 (1902).

[5]Patch v. Wabash Ry., 207 U.S. 277 (1907); St. Louis & San Francisco Ry. v. James, 161 U.S. 545 (1896); Winn v. Wabash Ry., 118 Fed. 55 (8th Cir., 1902); Missouri and Pacific Ry. v. Meeh, 96 Fed. 753 (8th Cir., 1895).

[6]Louisville, New Albany & Chicago Ry. v. Louisville Trust Co., 174 U.S. 552 (1899); Memphis & Charleston Ry. v. Alabama, 107 U.S. 581 (1882); Town of Bethel v. Atlantic Coast Line Ry., 81 F.2d 60 (4th Cir., 1936); Peterborough R.R. v. Boston & M. R.R., 239 Fed. 97 (1st Cir., 1936).

[7]Bunn, *op. cit supra* note 2, at page 44.

[8]Instant case at p. 105.

[9]Instant case at p. 107: The court noted that there had been do decision by the United States Supreme Court precisely in point, and the problem had not even been considered since 1912. The court also noted that "the Restatement expressly disclaims pronouncing on the question of removal of causes to the federal courts"; "The right to remove to the federal court a suit by or against a corporation is not considered in the Restatement of this subject." Restatement, Conflict of Laws § 207(c) (1934).

It seems that the court here attempted to lay down a clear rule by which to determine when federal courts have jurisdiction because of diversity of citizenship when multi-state corporations are involved. The decision is radical in its result in that previously federal jurisdiction was denied on these grounds.[10]

J. A. Bellan, Jr.

Innkeepers—Liability for Injuries to Guest Caused by Defective Premises

Plaintiff, a guest in defendant's hotel, was injured when she slipped on some slippery substance in a bath tub. Held: The plaintiff did not state a cause of action. By analogy with Justice Holmes' famous decision in *Baltimore & Ohio R.R. v. Goodman,*[1] the court said that a reasonable person knows that a bath tub is a place of "inherent danger," and he should, at least, "stop and look" before stepping into a bath tub. *Miller v. Shull,* 48 So.2d 521 (Fla. 1950).

While at common law the innkeeper was an absolute insurer of the person and property of his guest,[2] it can be said today, disregarding niceties of distinction, that the duty required of an innkeeper is to exercise reasonable or ordinary care for the personal safety of his guest,[3] which duty is imposed by law[4] and cannot be delegated.[5] This duty, however, extends only to places where the guest can reasonably be expected to go.[6] An independent intervening cause will absolve the innkeeper from liability, if it alone would have caused the injury.[7]

Although the innkeeper is not the insurer of the personal safety of his guest,[8] the guest, as invitee, is entitled to assume that proper care has been exercised to make the premises safe for him.[9] Furthermore the guest is not required to be on the alert

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[10]Patch v. Wabash Ry., 207 U.S. 277 (1907); Starke v. New York, Chicago & St. Louis Ry., 180 F.2d 569 (7th Cir., 1950); Town of Bethel v. Atlantic Coast Line Ry., 81 F.2d 60 (4th Cir., 1936), *cert. denied,* 298 U.S. 681 (1936); Geoffrey v. New York, N.H. & H. Ry., 16 F.2d 1017 (1st Cir., 1927); Missouri Pac. Ry. v. Meeh, 69 Fed. 753 (8th Cir., 1895).

[1]275 U.S. 66 (1927).

[2]Epp v. Bowman-Biltmore Hotel Corp., 171 Misc. 338, 12 N.Y.S.2d 384 (1939); Hulett v. Swift, 33 N.Y. 571 (1865).

[3]Burgouer v. McClellan, 205 Ky. 51, 265 S.W. 439 (1924); Early v. Lowe, 119 W. Va. 690, 195 S.E. 852 (1938); DeLatour v. Roosevelt Hotel, 1 So.2d 353 (La. App. 1941); Jacobson v. Simmons, 217 Mass. 194, 104 N.E. 490 (1914); Hillman Hotel v. McHaley, 38 So.2d 566 (Ala. 1948); Lemieux v. Lataille, 75 A.2d 184 (R.I. 1950).

[4]Dye-Washburn Hotel Co. v. Aldridge, 207 Ala. 471, 93 So. 512 (1922).

[5]Friedman v. Shindler's Prarie House, 224 App. Div. 232, 230 N.Y. Supp. 44 (1928); Stott v. Churchill, 15 Misc. Rep. 80, 36 N.Y. Supp. 476 (1895), *aff'd,* 157 N.Y. 692, 51 N.E. 1094 (1898).

[6]Dye-Washburn Hotel Co. v. Aldridge, *supra* note 4; Hillman Hotel v. McHaley, *supra* note 3.

[7]Dye-Washburn Hotel Co. v. Aldridge, *supra* note 4.

[8]Aucoin v. New York Causualty Co., 35 So.2d 871 (La. App. 1948); Hays v. The Texan, 174 S.W.2d 1006 (Tex. Civ. App. 1943); Hotel Richmond v. Wilkinson, 73 Ga. App. 36, 35 S.E.2d 536 (1946).

[9]Nettles v. Emerick, 22 F. Supp. 441 (M.D. Pa. 1938); Adams v. Mohican Hotel, 124 Conn. 400, 200 Atl. 336 (1938).

for all possible defects in the premises, as a licensee would be.[10] The duty owed to a guest does not extend to dangers which are known[11] to the guest or which are so apparent that he may reasonably be expected to discover them and be able to protect himself.[12] It has been held that this duty does not extend to an invitee who comes to the inn or hotel for an immoral purpose, in which case he is considered a mere licensee,[13] but it is submitted that the contrary view has the more logical basis.[14]

Some states have limited the innkeeper's liability for injuries resulting from defective premises to those known to him or which with the exercise of reasonable care he could have discovered.[15] Also it is sometimes held that the guest assumes the risk of patent defects,[16] while the doctrine of *res ipsa loquitur* applies to latent defects.[17]

Justice Holmes' decision in the *Baltimore & Ohio R.R. v. Goodman,* holding that it is negligence as a matter of law for the driver not to leave his vehicle to get an unobstructed view of the crossing, has been rejected, evaded, and severely criticized in various jurisdictions, and has led only to confusion.[18] The court in the instant case apparently is lending support to this doctrine by holding that it is negligence as a matter of law not to ascertain the condition of a bath tub before stepping into it. This imposes what seems to be an unusual degree of care upon the guest.

The Florida court, in this case, seems to have departed from the general rule determining the liability of an innkeeper. This departure may be attributed to the fact that in Florida, a tourist state, the court is seeking to protect its hotel owners.

K. Hayes Callicutt

Insurance—Beneficiary's Right to Proceeds When Insured's Death Is Caused by Beneficiary

Evidence—Judgment and Testimony From Criminal Prosecution Not Admissible in Civil Action

Beneficiary of a life insurance policy, wife of insured, ran from her home after the insured assaulted and threatened her, and thereafter returned with a gun and fired a shot through a window, fatally injuring the insured. After the fatal shot, the insured continued the assault until he succumbed to his wound. Beneficiary was tried

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[10]Jones v. Bland, 182 N.C. 70, 108 S.E. 344 (1921); Morrison v. Hotel Ruthledge Co., 200 App. Div. 636, 193 N.Y. Supp. 428 (1922).

[11]Early v. Lowe, *supra* note 3.

[12]Avary v. Anderson, 31 Ga. App. 402, 120 S.E. 683 (1923); Baker v. Butterworth, 119 Va. 402, 89 S.E. 849 (1916).

[13]Williams v. Mayer, 4 So.2d 71 (La. App. 1941).

[14]Tomko v. Feldman, 128 Pa. Super. 429, 194 Atl. 338 (1937).

[15]Crawford v. Pacific States Saving & Loan Co., 22 Cal. App. 2d 448, 71 Pa.2d 333 (1937); Lynch v. Sprague, 95 N.H. 485, 66 A.2d 697 (1949); Rudolph v. Elder, 105 Cal. 105, 95 P.2d 827 (1939); Ziegler v. Providence Biltmore Hotel Co., 59 R.I. 326, 195 Atl. 397 (1937).

[16]Ten Broeck v. Wells, Fargo Co., 47 Fed. 699 (N.D. Cal. 1891); Topley v. Zeeman, 21 Cal. 182, 13 P.2d 666 (1932).

[17]Crocket v. Troyk, 78 S.W.2d 1012 (Tex. Civ. App. 1935); Minzer v. Wilson, 21 Cal. App. 2d 85, 68 P.2d 370 (1937); Morris v. Zimmerman, 138 App. Div. 114, 122 N.Y. Supp. 900 (1910); Tamres v. Reed, 109 Pa. Super. 28, 165 Atl. 530 (1933).

[18]See, Pakora v. Wabash Ry. 292 U.S. 98 (1933), note 4 p. 106, 91 A.L.R. 1049; Note, 43 Harv. L. Rev. 926 (1930).

in a criminal action and acquitted. The present controversy is the result of interpleader action by the insurance company to determine the beneficiary's right to the proceeds of the policy. HELD: In such an action, the court need not adjudge that the act was murder in order to preclude recovery by the beneficiary. Further, evidence of acquittal in a criminal proceeding is inadmissible. It is enough that the act was "willful" and without justification in law. *Gholson v. Smith,* 48 So.2d 603 (Miss. 1950).

The essential contingency on which the payment of life insurance ordinarily depends is the death of the insured.[1] Generally, whether a particular loss is covered by a life insurance policy depends on the intention of the parties.[2] Apart from provisions in the contract of insurance, there is no public policy which prevents recovery on a life insurance contract where the insured is murdered,[3] unless the death of the insured be intentionally or feloniously inflicted,[4] or procured,[5] by the beneficiary,[6] or the assignee.[7] Conversely, the beneficiary is not denied recovery if his lethal act was unintentional[8] or not felonious,[9] or where there is some doubt whether the death was felonious, intentional,[10] or in self defense.[11] However, it has also been held that an unlawful intentional killing, whether felonious or not, will defeat the beneficiary's interest.[12]

Schmidt v. Northern Life Association[13] is the earliest appellate decision actually denying recovery to a beneficiary, or those claiming through him, on the ground that he had taken the insured's life. There is no question that the maxim, *nullus commodum capere protest de injuria sua propia*[14] had its inception in the protection of the public by the judiciary, but this works some hardship, because those claiming through a slayer are barred whenever the slayer himself is barred.[15]

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[1]Old Colony Trust Co. v. Commissioner of Internal Revenue, 102 F.2d 380 (1st Cir. 1939).

[2]Neel v. Mutual Life Insurance Co. of New York, 131 F.2d 159 (2nd Cir. 1942).

[3]Columbian Mutual Life Insurance Co. v. Martin, 175 Tenn. 5170, 136 S.W.2d 52 (1940).

[4]However, in the case of Shellenburger v. Ranson, 41 Neb. 631, 59 N.W. 935 (1894) the court could find no public policy preventing property to descend to the wrongdoer because, "The demands of public policy are satisfied by the proper execution of the laws and the punishment of the crime."

[5]Henderson v. First National Bank, 229 Ala. 658, 159 So. 212 (1935); *cf.* Anderson v. Anderson, 158 Miss. 116, 130 So. 91 (1930) (evidence insufficient to prove wife willfully procured death of husband).

[6]Penn. Mutual Life Insurance Co. v. Nunnery, 176 Miss. 197, 167 So. 416 (1936).

[7]46 C.J.S., INSURANCE § 1171.

[8]Minasian v. Aetna Life Insurance Co., 295 Mass. 1, 3 N.E.2d 17 (1936).

[9]Tippens v. Metropolitan Life Insurance Co., 99 F.2d 671, 675 (5th Cir. 1938).

[10]See Note 9 *supra.*

[11]Penn. Mutual Life Insurance Co. v. Nunnery, *supra* note 6; American National Life Insurance Co. v. Shaddinger. 205 La. 11, 16 So.2d 889 (1944).

[12]Metropolitan Life Insurance Co. v. Hill, 115 W.Va. 515, 177 S.E. 188 (1934).

[13]102 Iowa 41, 83 N.W. 800 (1900).

[14]No one is able to take advantage of his own wrong. Shellenberger v. Ransom, *supra* note 4; Protective Life Insurance Co. v. Linson, 245 Ala. 493, 17 So.2d 761 (1944). The problem did not arise under the common law until comparatively recent times, "because of the ancient common law doctrine of attainder and corruption of blood." Wall v. Pfanschmidt, 265 Ill. 180, 183, 106 N. E. 785, 786, (1914).

[15]Box v. Lanier, 112 Tenn. 393, 79 S.W. 1042 (1904); Schmidt v. Northern Life Association, *supra* note 13. This rule has been criticised as denying recovery to innocent parties (*i.e,* creditors and next of kin) claiming through the wrongdoer although the wrongdoer alone is guilty. Deem v. Millikin, 6 Ohio Cir. Ct. 357, *aff'd.,* 53 Ohio St. 668, 44 N.E. 1134 (1892). See also, Grossman, *Liability and Rights of the Insurer When the Death of the Insured is Caused by the Beneficiary or an Assignee.* 10 B.U.L.REV. 281, 287 (1930).

It seems that the rule in Mississippi is that the beneficiary must have "willfully" caused the death of the insured,[16] while in another jurisdiction he must be convicted of the crime of killing the insured if the benefits are to be denied.[17] The word "willful", like so many other words in our language, is elastic, and is of somewhat varied purport according to the context in which it is found and the nature of the subject matter to which it refers. It has been held that a willful killing is simply an intended killing[18] while in other jurisdictions, the courts will require a specific deliberate and premeditated killing for the use of this term.[19] It is manifest that "willful" is simply an illusive instrument of the judiciary by the use of which a desired result may be reached.

What do the courts usually regard as proper evidence in a civil action in determining whether the beneficiary's action was willful or not? The rule supported by the great weight of authority is to the effect that a judgment of conviction or acquittal rendered in a criminal prosecution cannot be given in evidence in a purely civil action.[20] Various reasons have been advanced for the rule of inadmissibility, including dissimilarity of object,[21] issues,[22] procedure,[23] and degree and element of proof.[24] There is some authority, however, to the general effect that the record of a conviction or acquittal is evidence of the facts on which it was based in a civil action;[25] but, such evidence is held to be merely persuasive and not conclusive.[26] It is the present trend in Mississippi to exclude all evidence adduced in prior criminal proceedings.[27]

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[16]Gholson v. Smith, 48 So.2d 603 (Miss. 1950). An interesting case recently decided by the Mississippi Supreme Court is Henry v. Toney, 50 So.2d 921 (Miss. 1951) which held that proof of the defendant's plea of guilty to manslaughter was not conclusive of a willful killing under § 479 of Miss. Code (1942), and did not necessarily preclude inheritance by the defendant. Thus, it seems that a beneficiary of an insurance policy might recover the proceeds even though he had been convicted of manslaughter if the court finds the killing not willful.

[17]Hogg v. Whitham, 120 Kan. 341, 242 Pac. 1021, 1022 (1926); Noller v. Aetna Life Insurance Co., 142 Kan. 35, 46 P.2d 22 (1935).

[18]State v. Townsend, 66 Iowa 741, 242 N.W. 535 (1885).

[19]State v. Mangano, 77 N.J.L. 544, 72 Atl. 366 (1909); Miller v. State, 3 Okl. Cr. 575, 107 Pac. 948 (1910).

[20]Interstate Dry Goods Stores v. Philip Williamson, 91 W. Va. 156, 112 S.E. 301 (1922). The writer has been unable to find any Mississippi cases upholding this proposition other than Gholson v. Smith, *supra* note 16.

[21]State v. Brodnack, 69 Conn. 212, 37 Atl. 492, 494 (1897) (dicta as to effect of different objects and results).

[22]U.S. v. Donaldson-Schultz Co., 148 Fed. 581 (4th Cir. 1906).

[23]Young v. Copple, 52 Ill. App. 547 (1894) (different rules of decisions and course of proceeding).

[24]Jay v. State, 15 Ala. App. 255, 73 So. 137, *cert. denied,* 198 Ala. 691, 73 So. 1000, 1001 (1916) (dicta as to effect of difference of parties and degrees of proof).

[25]Bankston v. Folks, 38 La.Ann. 267 (1886).

[26]Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution,* 49 Harv. L. Rev. 715, 750 (1936), wherein it is urged that such evidence should be made admissible by statute.

[27]Gholson v. Smith, *supra* note 16.

Many states have statutes specifically dealing with this problem.[28] Mississippi has no such statute, nor has the judiciary found a need for a statute of this type, basing its decisions on the broad concepts of public policy. It would be futile to construct any "true rule" by pure logic. If public policy is the correct basis for barring the beneficiary from taking the insurance, it is entirely a matter of opinion just how far public policy requires the rule to be extended. It seems clear that the beneficiary will be denied the proceeds of the insurance if the court brands his action willful,[29] and granted if such action be declared not willful.[30]

Millard Mundell Bush, Jr.

Real Property—Way of Necessity—Denied When Grantee Fails to Prove Grantor Had Such Way

In 1904, one Price, by warranty deed, conveyed the coal rights from his fee to one Ehrlich. In 1931, Price sold two acres of the surface to plaintiff, expressly excepting all coal rights. Plaintiff built a home and drilled a well which went through the conveyed coal seam. In 1940, defendant became the owner of the coal rights acquired by Ehrlich and in the course of mining operations cut plaintiff's well casing and deprived plaintiff of his water supply. Plaintiff sues on the ground that the act of defendant constituted a trespass upon the easement to which he was entitled because of necessity. The lower court granted judgment in favor of plaintiff. Held: Reversed. Burden of proof is on person claiming way of necessity and plaintiff has failed to prove same. *Pyramid Coal Corp. v. Pratt,* 92 N.E.2d 858 (Ind. 1950).

It appears that the effect of this decision was to leave plaintiff without power to invoke the doctrine of way of necessity to obtain water needed for his household. The court approves the doctrine of necessity and the transferability of a way of necessity.[1] "A way of necessity is based upon the presumption of a grant, and will not be implied if the tracts have not in the past belonged to one person."[2]

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[28]However, §§ 672 and 479 of Miss. Code (1942) declare the general policy of the legislature that no one shall "take" under a will, or "inherit" from one whose death he has willfully caused or procured. A problem which sometimes arises in states where there are no such statutes is whether the insurance proceeds should be paid to the estate of the decedent when the slayer is the sole or even the chief heir. That they should be paid to the decedent's estate in spite of this fact: National Benefit Life Insurance Co. v. Davis, 38 Ohio App. 454, 176 N.E. 490 (1929). That they should not: Wickline v. Phoenix Mutual Life Insurance Co., 106 W.Va. 424, 145 S.E. 743 (1928). This problem will not arise in Mississippi because of the above sections of the Code. See Lipscomb, *Insurer's Liability and Rights When Insured's Death is Caused by Beneficiary or Assignee,* 8 Miss. L. J. 476, 481 (1936).

[29]Gholson v. Smith, *supra* note 16.

[30]Henry v. Toney, *supra* note 16.

[1]The court, in recognizing the doctrine of way of necessity, cites the case of Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 25 Atl. 597 (1893). There the owner of the surface conveyed the coal, and upon finding out that other valuable minerals lay below the coal strata, conveyed them. When an action was brought to enjoin the drilling of wells, the court held that the owner of the surface retains title to everything beneath the coal and has the right of access to it. This decision has been followed by Pace v. State, 191 Miss. 780, 4 So.2d 270 (1941); Gulf Refining Co. v. Stone, 197 Miss. 713, 21 So.2d 19 (1945); Hoffstot v. Dickerson, 71 F. Supp. 897 (1947).

[2]Tiffany, Real Property, § 343 (Abr. Ed. 1940).

There cannot be a way of necessity over the land of a stranger to the title.[3] If a way of necessity exists, it comes into being at the time of the severance,[4] and exists only so long as the necessity remains present.[5]

Approving the above principles, the court in the instant case held that one who claims a way of necessity has the burden of proof of the facts requisite to an implied grant of an easement by way of necessity.[6] For the plaintiff to prove that a way of necessity existed, it would be necessary to show that the land was underlaid with a solid mass of coal. Does this put an undue burden on the plaintiff? As a general rule it is held that a way of necessity will not be implied if there is another, though much less convenient, mode of access, unless such involves very great or disportionate labor or expense.[7] Most of the cases in which this rule has been applied involve access to highways and the like. In a landmark case,[8] the owner of a lot sought a way of necessity from his lot across land conveyed by him to the highway. It was shown that to construct a way across his own land to the highway would cost more than his land was worth. In view of this fact, the court found that a way of necessity existed. In the instant case, it would seem that the location of the coal seams underlying this land might be quite expensive and might conceivably exceed the value of the two acres owned by the plaintiff, thereby bringing the plaintiff within the above rule. However, no proof as to the extent of the coal field or the expenditures necessary to determine such extent was presented by plaintiff; therefore, he failed to establish the proof necessary to show a way of necessity. For this reason, the decision in the instant case seems to be justifiable.

Ralph D. Pruett, Jr.

Taxation—Survivorship Annuities Under Widow's Pension Plan Not Part Of Employee's Gross Estate

Decedent, W. J. Higgs, by exercise of an option under a pension plan to which he had made no contributions, took a reduced annuity and transferred a survivorship annuity to his widow. Court held that there was no "transfer" within the meaning of I.R.C. Sec. 811(c),[1] as amended in 1949. Therefore, the value of the survivorship annuity was not to be included in the decedent's gross estate. *Higgs' Estate v. Commissioner of Internal Revenue,* 184 F.2d 427 (3rd Cir. 1950).[2]

The Tax Court decision in the present case[3] was reversed by the Circuit Court. The prior decision was decided before the 1949 amendment to the statute, which indicates that the amendment changed the law.

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[3]Crotty v. New England & Pocahontas Consolidated Coal Co., 72 W. Va. 68, 78 S.E. 233 (1913); State v. Orcutt, 211 Ind. 523, 7 N.E.2d 779 (1937).
[4]Burling v. Leiter, 272 Mich. 448, 262 N.W. 388 (1935); Jones v. Bethel, 20 Ohio App. 442, 152 N.E. 734 (1925).
[5]Smith v. Skrbek, 71 Cal. App.2d 351, 162 P.2d 674 (1945).
[6]Fox v. Paul, 158 Md. 379, 148 Atl. 809 (1930); Bains v. Parker, 143 Tex. 57, 182 S.W.2d 397 (1944).
[7]Marshall v. Martin, 107 Conn. 32, 139 Atl. 348 (1927).
[8]See note 7 *supra.*

[1]Pub. L. No. 378, 81st Cong., 1st Sess. § 7(C) (Oct. 25, 1949).
[2]The Solicitor General has decided that no petition for certiorari will be filed in the present case. P-H 1951 Fed. Tax Serv. § 71,023 (1951).
[3]William J. Higgs, 12 T.C. 280 (1949).

Prior to the amendment to I.R.C. Sec. 811(c) in 1949 similar survivorship annuities were included in the decedent's gross estate.[4] This taxation was based on the decision in *Helvering v. Hallock*,[5] and was further supported by the *Church* and *Spiegel* cases.[6] These cases were decided on the basis that any transfer of an interest to take effect in possession or enjoyment at or after the death of the transferor should be included in the decedents gross estate. Such a transfer would have come within I.R.C. Sec. 811(c).[7] Under the construction give by the present case, however, the amended statute includes such interests only if the decedent reserved a reversionary interest.[8]

Under I.R.C. Sec. 811(c)(1)(B) a transfer is included in the gross estate if the decedent reserved a life estate, or similar interest.[9] Likewise, suvivorship annuities have been held taxable where the decedent transferred property to purchase the annuity contract.[10] These cases are based on the theory that the decedent owned the entire annuity and merely reserved a life interest in himself. Thus, the transfer is brought within the scope of I.R.C. Sec. 811(c)(1)(B).

The present case is distinguished from these decisions on the grounds that the employer and not the employee paid for the annuity. This prevented the employee from having any property right capable of being transferred. An argument against such a distinction is that the employee received the annuity as part of his salary from the employer.[11] If this is so, then it would seem that the employee had paid for the annuity and should have a property right in it even prior to his election. Such a property interest would be subject to a transfer with a life estate reserved if the widows' option were elected.

Survivorship annuities are not included in the decedent's gross estate where the pension plan is under the control of the employer to such an extent that the decedent had no property interest capable of being transferred.[12] This is so even where the decedent has contributed to the plan, if the plan limits his rights to merely recovering what he paid into the pension fund.[13] Such a holding seems to be closely related to the general rule that where the employer makes a voluntary payment to the beneficiary, either in the form of a lump sum payment or an annuity, it is not included in the decedent's gross estate.[14] The present case, however, has been dis-

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[4]Letter Ruling, Commissioner of Internal Revenue, Dated February 3, 1944, C.C.H. FEDERAL ESTATE AND GIFT TAX SERVICE, § 3440.642.

[5]Helvering v. Hallock, 309 U.S. 106 (1940).

[6]Commissioner v. Estate of Church, 335 U.S. 632 (1949); Estate of Spiegel v. Commissioner, 335 U.S. 701 (1949).

[7]"(c) Transfers in contemplation of, or taking effect at death. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise * * * intended to take effect in possession or enjoyment at or after his death."

[8]Pub. L. No. 378, 81st Cong., 1st Sess. § 7(C) (Oct. 25, 1949).

[9]"(B) under which he has retained for his life * * * the possession or enjoyment of or the right to the income from, the property * * *".

[10]Commissioner v. Wilder's Estate, 118 F.2d 281 (5th Cir. 1941), *cert. denied* 314 U.S. 634; Commissioner v. Clise, 122 F.2d 998 (9th Cir. 1941), *cert. denied* 315 U.S. 281; Mcarkle's Estate v. Commissioner, 129 F.2d 386 (3rd Cir. 1942); and Mary L. Pruyn, 12 T.C. 754 (1949).

[11]P-H STUDENT TAX LAW SERVICE, Notes and Problems to § 10,181 (1951).

[12]Emil A. Stake, 11 T.C. 817 (1948); William S. Miller, 14 T.C. 657 (1950). The latter case is pending before the Court of Appeals of the 7th Circuit.

[13]William S. Miller, *supra* note 11.

[14]P-H 1951 FEDERAL TAX SERVICE § 23,249-c (1951).

tinguished from such decisions on the grounds that the decedent had a definite interest, which was not subject to change by the employer.[15]

There are several policy arguments in favor of the decision in the present case. Two of these are: (1) to hold otherwise would result in double taxation, since the widow has to pay income tax on the entire receipt of the annuity:[16] (2) the widow may be made to suffer undue hardships if she has to pay an estate tax on the value of the annuity, and the annuity is the larger part of her inheritance.[17] Therefore, the decision is good if the object sought is the protection of the widow. If, however, better taxation is the object sought, the decision may have opened up a loop hole which was not forseen when the statute was amended.

Harris B. Henley

Torts—Blasting—Bases of Decisions

Plaintiffs owned real estate and dwelling house in close proximity to public highway. Defendant was engaged in public construction work on the highway. In the course of the work defendant, through his agents, blasted rock formations by the use of dynamite. The blasting caused severe damage to plaintiffs' property. Held: Defendant not liable. Fault is a requisite for liability. *Reynolds v. Hinman Co.*, 75 A.2d 802 (Maine 1950).

Where injury results to property as a result of blasting, liability may be imposed on the basis of: negligence,[1] trespass,[2] nuisance,[3] or "ultrahazardous activities"[4] (the equivalent of the standard applied in *Rylands v. Fletcher*). It is to be emphasized at the beginning that these methods of approach may not be differentiated in all instances because of their inherent vagueness and overlapping. Adding to the nebulousness of the approaches, the courts, by and large, have tended to justify their results by very loose and confusing language.

Negligence. If the blasting is executed negligently, liability generally attaches, regardless of whether the injury is brought about "directly" (*i.e.*, by an impact of debris, rocks, etc.)[5] or "indirectly" (*i.e.*, by vibration or concussion)[6]; however, to

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[15]William S. Miller, *supra* note 11.

[16]Letter Ruling unpublished. Confirmed by Letter Ruling, Commissioner of Internal Revenue, Dated October 9, 1946.

[17]Anthony A. Bliss, *Widows' Pension Plan and the Higgs' Case,* New York University Eighth Annual Institute on Federal Taxation, p. 376 (1950).

[1]Benton Gravel Co. v. Wright, 206 Ark. 930, 175 S.W.2d 208 (1943); Booth v. Rome, W. & O. Terminal R.R., 140 N.Y. 267, 35 N.E. 592 (1893).

[2]Universal Atlas Cement Co. v. Oswald, 135 S.W.2d 591 (Tex. Civ. App. 1939); Asheville Construction Co. v. Southern Ry., 19 F.2d 32 (4th Cir. 1927); Williams v. Codell Construction Co., 253 Ky. 166, 69 S.W.2d 20 (1934).

[3]Tennessee Coal, Iron & R.R. v. Hartline, 244 Ala. 116, 11 So.2d 833 (1943); Longtin v. Persell, 30 Mont. 306, 76 Pac. 699 (1904); Green v. Shoemaker, 111 Md. 69, 73 Atl. 688 (1909); Booth v. Rome, W. & O. Terminal R.R., 140 N.Y. 267, 35 N.E. 592 (1893).

[4]Rylands v. Fletcher, L.R. 1 Ex. 265 (1866), *aff'd* L.R. 3 H.L. 330 (1868) (collected water); Richard v. Kaufman, 47 F. Supp. 337 (E.D. Pa. 1942); Brown v. L. S. Lunder Construction Co., 240 Wis. 122, 2 N.W.2d 859 (1942); Fitzsimons & Connell Co. v. Braun, 199 Ill. 390, 65 N.E. 249 (1902); Restatement, Torts §§ 519 & 520 (1939); *cf.* Belvedere Fish Guano Co. v. Rainham Chem. Works, 2 K.B. 487 (1920), *aff'd* 2 A.C. 465 (1921).

[5]Klepsch v. Donald, 8 Wash. 162, 35 Pac. 621 (1893).

[6]Bessemer Coal, Iron & Land Co. v. Doak, 152 Ala. 166, 44 So. 627 (1907); Hieber v. Central Kentucky Traction Co., 145 Ky. 108, 140 S.W. 54 (1911).

have standing in court, the property owner must have suffered a "legal injury."[7] If a statute or ordinance is violated which sets forth certain precautions which the blaster must take, the violation may be considered negligence per se[8] or merely evidence of negligence.[9] Negligence is usually inferred if the area affected by the blast is greater than is usual or reasonable, or if more explosive is used than is necessary.[10] Negligence may also be inferred or presumed under the doctrine of *res ipsa loquitur*.[11]

Nuisance. Although the term is used loosely by many courts and text writers, strictly speaking, nuisance rests on the determination that the rights or interests of another have been invaded and not upon the fact that a particular act has been committed.[12] A nuisance may arise when a right or interest is invaded intentionally,[13] negligently,[14] or as a result of the performance of an ultrahazardous activity.[15] Whether blasting is or is not a "nuisance" depends on the facts of the particular situation.[16] The likelihood or probability of injury is important in the determination of whether or not a nuisance results (it would be difficult to distinguish this test of "nuisance" from the tests employed in cases of "ultrahazardous activities"). Blasting in or near a city has been held a "nuisance," creating absolute liability,[17] while blasting in the country creates liability only if the injury results from the negligence of the blaster.[18] Continuous blasting has been held a "nuisance."[19] Where the right to blast has been given the blaster, the grantor can claim damages only if the blasting is done negligently, even though the blasting results in a nuisance.[20]

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[7]Hieber v. Central Kentucky Traction Co., 145 Ky. 108, 140 S.W. 54 (1911); Booth v. Rome, W. & O.T.R.R., 140 N.Y. 267, 35 N.E. 592 (1893).

[8]Brannock v. Elmore, 114 Mo. 55, 21 S.W. 451 (1893).

[9]Mahoney v. Dankwart, 108 Iowa 321, 79 N.W. 134 (1899); Koster v. Noonan, 8 Daly 231 (N.Y. 1879).

[10]Benton Gravel Co. v. Wright, 206 Ark. 930, 175 S.W.2d 208 (1943); Universal Atlas Cement Co. v. Oswald, 135 S.W. 2d 591 (Tex. Civ. App. 1939); Klepsch v. Donald, 8 Wash. 162, 35 Pac. 621 (1893); Booth v. Rome, W. & O. Terminal R.R., 140 N.Y. 267, 35 N.E. 592 (1893).

[11]Universal Atlas Cement Co. v. Oswald, 135 S.W.2d 591 (Tex. Civ. App. 1939); Klepsch v. Donald, 8 Wash. 162, 35 Pac. 621 (1893); Ulrich v. McCabe, 1 Hilt. 251 (N.Y. 1856).

[12]RESTATEMENT, TORTS, scope and introductory note to chapter 40 (1939); BLACK'S LAW DICTIONARY, p. 1263 (3rd ed. 1933).

[13]RESTATEMENT, TORTS § 825 (1939).

[14]Rose v. Standard Oil Co., 56 R.I. 272, 185 Atl. 251 (1936); RESTATEMENT, TORTS § 822 (1939).

[15]Gossett v. Southern R.R., 115 Tenn. 376, 89 S.W. 737 (1905); Longtin v. Persell, 30 Mont. 306, 76 Pac. 699 (1904); RESTATEMENT, TORTS, § 822 (1939).

[16]Tennessee Coal, Iron & R.R. v. Hartline, 244 Ala. 116, 11 So.2d 833 (1943).

[17]Green v. Shoemaker, 111 Md. 69, 73 Atl. 688 (1909); Longtin v. Persell, 30 Mont. 306, 76 Pac. 699 (1904); Munro v. Pacific Coast Dredging & Reclamation Co., 84 Cal. 515, 24 Pac. 303 (1890).

[18]Cary Bros. v. Morrison, 129 Fed. 177 (8th Cir. 1904); Houghton v. Loma Prieta Lumber Co., 152 Cal. 500, 93 Pac. 82 (1907).

[19]Dixon v. New York Trap Rock Corp., 293 N.Y. 509, 58 N.E.2d 517 (1944); Central Iron & Coal Co. v. Vanderheurk, 147 Ala. 546, 41 So. 145 (1906); Longtin v. Persell, 30 Mont. 306, 76 Pac. 699 (1904).

[20]Adams' Adm'r. v. Callis & Hughes, 253 Ky. 382, 69 S.W.2d 711 (1934); Marvin v. Brewster Iron Mining Co., 55 N.Y. 538, 14 Am. Rep. 322 (1874).

Trespass. The courts generally agree that a trespass is committed when, as a result of blasting, rock and debris are thrown onto the property of another, and the blaster is liable for the damage, irrespective of whether the blasting is negligently done.[21] Many courts make a distinction between the cases in which damage results from concussion and the cases in which damage results from showering rocks, by requiring that negligence be shown before liability attaches in the event of damage by concussion.[22] The basis of this distinction is chiefly the historical difference between trespass and case,[23] but there would seem to be no practical reason or scientific basis for the distinction; consequently, many courts draw no distinction.[24]

Ultrahazardous activities. This theory is an extension of the rule handed down in the famous English case of *Rylands v. Fletcher.*[25] It has been applied to blasting, which is so dangerous in and to the surroundings that the risk involved as compared with the utility and prevalence of the activity warrants the imposition of absolute liability.[26]

Conclusion. The imposition of absolute liability for injuries resulting from blasting operations would be more "just" as it would place the economic burden on those who engage in the endeavor or those who engage the work to be done. Under the absolute liability rule the blaster could provide beforehand for unavoidable disasters by means of insurance and by reflecting the cost of the insurance in the price of his work. Although it may seem unjust not to base liability on fault, it must be remembered that the person damaged is also not at fault. The latter has the added argument that he did not bring the "ultrahazardous activity" into being.

Of the three bases for imposing absolute liability, trespass, nuisance, and ultrahazardous activities, the last named would probably lead to fewer complications of precedents and legal theory, and for this reason would be preferable. The courts, however, seem to be inextricably meshed in the theories of trespass and nuisance.

Joe Ivy Gillespie

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[21]Jones v. Oman, 28 Tenn. 1, 184 S.W.2d 568 (1944); Louisville & N. R.R. v. Smith, 203 Ky. 513, 263 S.W. 29 (1924); Williams v. Codell Construction Co., 69 S.W.2d 20, 253 Ky. 166 (1934); Birmingham Ore & Mining Co. v. Grover, 159 Ala. 276, 48 So. 682 (1909); Hord v. Holston River R.R., 122 Tenn. 399, 123 S.W. 637 (1909); Asheville Construction Co. v. Southern Ry., 19 F.2d 32 (4th Cir. 1927); *accord,* Mairs v. Manhattan Real Estate Ass'n., 89 N.Y. 498 (1882) (even though blaster had license to blast from municipality).

[22]Bessemer Coal, Iron & Land Co. v. Doak, 152 Ala. 166, 44 So. 627 (1907); Hirt v. Misceli Bros. Construction Co., 80 N.Y.S.2d 798 (1948); Williams v. Codell Construction Co., 253 Ky. 166, 69 S.W.2d 20 (1934); Jenkins v. Tomasello, 286 Mass. 180, 189 N.E. 817 (1934); Gibson v. Womack, 218 Ky. 626, 291 S.W. 1021 (1927); Booth v. Rome W. & O.T.R.R., 140 N.Y. 267, 35 N.E. 592 (1893).

[23]Wendt v. Yant Construction Co., 125 Neb. 277, 249 N.W. 599 (1933).

[24]Brown v. Lunder Construction Co., 240 Wis. 122, 2 N.W. 2d 859 (1942); Wendt v. Yant Construction Co., 125 Neb. 277, 249 N.W. 599 (1933); Hickey v. McCabe, 30 R.I. 346, 75 Atl. 404 (1910); Longtin v. Persell, 30 Mont. 306, 76 Pac. 699 (1904); Fitzsimons & Connell Co. v. Braun, 199 Ill. 390, 65 N.E. 249 (1902).

[25]L.R. 1 Ex. 265 (1866), *aff'd* L.R. 3 H.L. 330 (1868).

[26]Richard v. Kaufman, 47 F. Supp. 337 (E.D. Pa. 1942); Brown v. Lunder Construction Co., 240 Wis. 122, 2 N.W.2d 859 (1942); Carson v. Blodgett Construction Co., 189 Mo. App. 120, 174 S.W. 447 (1915); Colton v. Onderdonk, 69 Cal. 155, 10 Pac. 395 (1886); Fitzsimons & Connell Co. v. Braun, 199 Ill. 390, 65 N.E. 249 (1902); *cf.* Exner v. Sherman Power Construction Co., 54 F.2d 510 (2nd Cir. 1931).

Torts—Right of Action in Wife's Administrator For Husband's Personal Torts

Plaintiff's intestate was murdered by her husband, who killed himself before his wife died. Plaintiff as administrator sued the husband's executor under the Injuries Act which provides that the beneficiary can sue only if the party injured could have maintained a suit if death had not ensued. Held: Recovery denied since the wife would not have had a right of action had she lived. To permit such actions would result in "collusion, duplicity, and hypocrisy," between spouses and considerations of public policy forbid such a change in the common law. *Welch v. Davis,* 95 N.W.2d 108 (Ill. 1950).

Disregarding momentarily the interpretation of the death statute, the underlying issue here is the right of one spouse to maintain a personal tort action against the other. In the absence of express statutory authority,[1] the majority of jurisdictions do not allow such actions.[2] This view is based upon the sometimes conflicting theories that to allow spouses to sue each other would result in a disruption of domestic harmony, a multitude of trivial, collusive, or fraudulent cases against insurance companies, or that the plaintiff has an adequate remedy in divorce or criminal actions.

The majority view is sharply criticized by most commentators on the subject[3] and the minority view holding that spouses may sue each other for personal torts is represented by a considerable body of authority.[4] Courts following the minority rule find it difficult to see how the tranquility of the home can be disrupted more by allowing such actions than by preventing a right of redress in one intentionally assaulted[5] or negligently injured.[6] Neither do they seem to be over-burdened by a flood of trivial litigation.[7] The fallacy of saying that there is an adequate "remedy" in a criminal action is obvious. Likewise it is anomolous to say that the plaintiff has an adequate remedy in the divorce courts while disallowing an action for personal torts because the harmony of the home will be disrupted.

By recognizing the possible danger to insurance companies, the court has overlooked the fact that fraud against insurance companies should not be presumed.[8] Some courts even say that where insurance is present, all grounds for the denial of actions within the family are removed.[9] The trend seems to be to permit such suits.[10]

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[1]N.Y. Laws c. 669, § 1 (1937).

[2]Austin v. Austin, 136 Miss. 180, 146 So. 877 (1924); Scales v. Scales, 168 Miss. 439, 151 So. 551 (1934); 41 C.J.S., Husband and Wife § 396, 26 Am. Jur., Husband and Wife §§ 589-598.

[3]Prosser, The Law of Torts § 99 (1941); McCurdy, *Torts Between Persons in Domestic Relations,* 43 Harv.L.Rev. 1030 (1930).

[4]Madden, Persons and Domestic Relations § 69 (1931).

[5]Harris v. Harris, 211 Ala. 222, 100 So. 333 (1924); Gilman v. Gilman, 78 N.H. 4, 95 Atl. 657 (1916); Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1915). In the latter case it was said, "If [the wife] may sue . . . for a broken promise, why may she not sue . . . for a broken arm?"

[6]Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Garrett v. Garrett, 229 N.C. 290, 49 S.E.2d 643 (1948).

[7]Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432 (1925); McCurdy, *op. cit. supra* note 3; Note 9 N.C.L. Rev. 89 (1930).

[8]See note 7 *supra.*

[9]Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 1905 (1930); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932).

[10]Courtney v. Courtney, 184 Okl. 395. 87 P.2d 660 (1938).

Turning to the death statute involved in the instant case it will be seen that the Illinois Injuries Act[11] is similar to the Mississippi death statute.[12] The Illinois court followed the general rule that under these statutes an action can be brought only if the deceased would have had an action had he survived.[13] Recent cases indicating that an independent cause of action arises[14] creates some conflict on the subject in Mississippi.[15] Some jurisdictions allow a right of action when the intra-family relationship of the parties would have prevented a right of action in the deceased had he lived,[16] and although the point was not raised therein, a Mississippi case allowed just such an action.[17] Therefore, it is difficult to predict what the Mississippi courts will do should a similar controversy arise in Mississippi.

George E. Gleason

Zoning—Consent as a Prerequisite to Building for Educational or Eleemosynary Purposes

Petitioner, an educational corporation, bought land in 1909 to be used for school purposes. In 1938 the Village of Bronxville enacted a zoning ordinance whereby petitioner was put in a residence "A" district. In 1941 an amendment to the zoning ordinance was enacted allowing the Board of Appeals to permit the erection in this area of a building for religious or eleemosynary purposes, provided the petitioner got the consent of eighty percent of the property owners fronting the street of the block where he intended erecting the building. After respondent denied petitioner's application for a permit to erect an additional school building, petitioner sought a mandamus order directing respondent to issue the permit. The trial court dismissed the case. The Appellate Division affirmed. Held: Reversed. The amendment is unconstitutional because no standards or guides are available and the prohibition does not serve the interest of the public. *Concordia Collegiate Institute v. Miller,* 301 N.Y. 825, 93 N.E.2d 632 (1950).

Usually, where surrounding property owners are allowed to waive a restriction which the zoning ordinance has imposed it is held not to be an invalid delegation of the legislative power.[1] However, such an ordinance will be held invalid or inapplicable

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[11]Ill. Rev. Stat. c. 70, § 1 (1947).

[12]Miss. Code § 1453 (1942).

[13]16 Am. Jur., Death §§ 82, 123; 25 C.J.S., Death § 24.

[14]Hasson Gro. Co. v. Cook, 196 Miss. 452, 17 So.2d 791 (1944); Thames v. Mississippi, 117 F.2d 949 (C.C.A. 5th 1941), *cert. denied,* 314 U.S. 630 (1941).

[15]Note 21, Miss. L.J. 392 (1950).

[16]Russell v. Cox, 65 Idaho 534, 148 P.2d 221 (1944); Oliveria v. Oliveria, 25 N.E.2d 766 (Mass. 1940); *cf.* Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 Atl. 663 (1936); Robinson v. Robinson, 188 Ky. 49, 220 S.W. 1074 (1920) (The Pennsylvania and Kentucky death statutes omit the stipulation that a right of action will exist where the deceased would have had such right had death not ensued); Ruiz v. Clancy, 182 La. 935, 162 So. 734 (1935).

[17]Nosser v. Nosser, 161 Miss. 636, 137 So. 491 (1931). Here the husband and son of the deceased sued their son and brother who was the son of the deceased although ordinarily the mother would not have been allowed to sue her son.

[1]Thomas v. Cussock, 242 U.S. 526 (1917) (Billboard); American Wood Products v. Minneapolis, 21 F.2d 440 (D. Minn. 1927) (industry); Myers v. Fortunato, 12 Del. Ch. 374, 110 Atl. 847 (1920) (public garage); Huntly Dairy v. Oak Park, 228 Ill. 256, 109 N.E. 11 (1915); Lowell v. Stoklosa, 250 Mass. 42, 145 N.E. 262 (1924); Shepard v. Seattle, 59 Wash. 363, 109 Pac. 1067 (1910) (hospital); Spokane v. Camp, 50 Wash. 554, 97 Pac. 770 (1908); 58 Am. Jur., Zoning § 143; 62 C.J.S. Municipalities § 227(9); Metzenbaum, The Law of Zoning, 277 (1930).

if the action of the property owners has the effect of legislation,[2] or if the ordinance furnishes no uniform rule,[3] is discriminatory,[4] is without justification[5] or is unreasonable, arbitrary and oppressive.[6] The courts seem to overlook the fact that consent ordinances allow a few property owners to waive a prohibition which the same ordinance declares inimical to the public interest.[7] To be weighed against this criticism, however, is the query: "What is the objection to allowing a right of waiver to those who have the greatest interest in the prohibition?" At least one court has upheld a consent ordinance on the ground that the consent of the surrounding property owners is merely a contingency which makes the ordinance inoperative in a certain locality.[8] Consent provisions have been held invalid where the surrounding property owners are allowed to prohibit the desired uses because the ordinance was not complete in itself and the action of the property owners is legislation,[9] but as pointed out in the instant case, the inaction of a small percentage of the property owners prohibits the desired use of the property.

In any event, zoning ordinances, like other legislation, must be reasonable.[10] The courts generally agree that it is an unlawful use of the police power to bar schools,[11] churches,[12] or other eleemosynary institutions[13] from residential districts because it is an unreasonable and arbitrary use of the police power, and is unrelated to the health, safety, and general welfare of the public or constitutes a deprivation of property without due process of law. Hence, it would seem that in the instant case the court has correctly applied the law.

George E. Gleason

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[2]METZENBAUM, THE LAW OF ZONING, 277 (1930).

[3]State v. Roberge, 278 U.S. 116 (1928).

[4]University Heights v. Cleveland Jewish Orphan's Home, 20 F.2d 743 (6th Cir. 1927), *cert. denied*, 275 U.S. 569; Austin v. Thomas, 96 W. Va. 628, 123 S.E. 590 (1924) (The court stated that permission may be granted to one and withheld from another under identical circumstances); St. Louis v. Russell, 116 Mo. 248, 22 S.W. 470 (1893).

[5]Denver v. United States Negroes Protective Asso., 76 Colo. 86, 230 Pac. 598 (1924).

[6]State v. Roberge, *supra* note 3; Spann v. Dallas, 111 Tex. 350, 235 S.W. 513 (1921).

[7]METZENBAUM, THE LAW OF ZONING, 277 (1930).

[8]Chicago v. Stratton, 162 Ill. 494, 44 N.E. 853 (1896).

[9]Leighton v. Minneapolis, 16 F. Supp. 101 (D. Minn. 1936).

[10]State v. Roberge, *supra* note 3; METZENBAUM, THE LAW OF ZONING, 293 (1930); YOKLEY, ZONING LAW AND PRACTICE, 383 (1948).

[11]Miami Beach v. State, 128 Fla. 750, 175 So. 537 (1937); Catholic Bishop of Chicago v. Kingery, 371 Ill. 257, 20 N.E.2d 583 (1939); Roman Catholic Archbishop v. Baker, 140 Ore. 600, 15 P.2d 391 (1932); 62 C.J.S. MUNICIPALITIES § 226(8); YOKLEY, ZONING LAW AND PRACTICE, 383 (1948); *But cf.* State v. Holekamp, 151 S.W.2d 685 (Mo. 1941).

[12]Sherman v. Simms, 143 Tex. 115, 183 S.W.2d 415 (1944); State v. Joseph, 139 Ohio St. 229, 39 N.E.2d 515 (1942).

[13]State v. Roberge, *supra* note 3; Women's Kansas City St. Andrew's Society v. Kansas City, 58 F.2d 593 (8th Cir. 1932); University Heights v. Cleveland Jewish Orphan's Home, *supra* note 4; Denver v. United States Negroes Protective Asso., *supra* note 5; Wilmington v. Turk, 14 Del.Ch. 392, 129 Atl. 572 (1925). *But cf.* Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930) (home for feebleminded).

BOOK REVIEWS

CIVIL RIGHTS IN THE UNITED STATES. By Alison Reppy. New York: Central Book Co., Inc., 1951, pp. 298. $4.50.

A glance at Alison Reppy's record reveals that he has excellent qualifications for an undertaking such as that produced here. The following are a few of his accomplishments: editor of the New York University Law Quarterly, President of the American Academy of Air Law and editor of the Air Law Review, editor of the Contemporary Law Pamphlet Series, and editor of the Anglo-American Legal History Series. Presently Mr. Reppy is dean of the New York Law School.

There has been a need for a book covering in detail the controversial field of civil rights. If anyone were asked to define "the civil rights" guaranteed to him under the Constitution, I fear his attempts would be fruitless. However, Dean Reppy, without attempting such a definition, has clearly outlined what are now considered on the part of groups of people as civil rights peculiar to them, although not precluded in their application to other groups or individuals. It is apparent, of course, that social groups will respond differently to the symbols which have a personal emotional connotation to them. The Dean has treated the decisions of the United States Supreme Court as applied to these social institutions.

The author's coverage extends to Military Law, Communism, the freedoms of assembly, speech, press and religion, discrimination as practiced against groups and the institution of labor, to name a few. In the main the discussion is centered upon what traditionally has appealed emotionally to us as Civil Rights. However, it is to be noted that the author includes such matters as the Atomic Energy Commission and the Atomic bomb. The survey of the Supreme Court decisions which he makes, covers the period of 1948, 1949 and 1950 up to the beginning of the October term of the court.

It cannot be said that the Dean's treatment is impartial. However, his style of writing attempts to lead one to believe that he is writing as an impartial observer. The Dean's opinions are from time to time reflected throughout the book, and his style is clear, concise and simple. The results produced by such style manifest the effort which has been put into the work and the scholarly character of the individual writing.

The book is recommended not only for members of the legal profession but also for the laymen who might thereby obtain a clear and better understanding of the problems of civil rights in the United States today.

The Dean is to be congratulated on his work, for he has clearly and efficiently presented the issues now at stake. In view of the troubled times in which we live and the possibility of repetition of the notorious witch hunts and hysteria which may come in the event of an all-out conflict, it is important that we have an informed public on such issues.

*Arthur B. Custy**

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*Acting Associate Professor of Law
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MISSISSIPPI CHANCERY PRACTICE. By V. A. Griffith. Second Edition.

Indianapolis, Indiana, Bobbs-Merill, 1950. pp. 969. $20.00.

In 1925 a thorough, systematic treatment of one phase of the adjective law of Mississippi was formulated by a thoroughly competent legal mind in Mr. Griffith's *Mississippi Chancery Practice.* Since then that book has experienced a unique treatment by the Mississippi practitioner.

Indicative of the esteem with which it was regarded were the oft heard remarks of the practitioners that the book was a veritable "bible" for practice in chancery. The Mississippi Supreme Court cited it often, and always with approval. The School of Law of the University of Mississippi prescribed it as a text for the course in Chancery Practice.

The instant edition of that book brings the subject up to date by incorporation of the statutory and judicial developments since 1925. Although the table of cases was omitted, a topical index, sufficiently detailed to afford easy access to the particular discussion one desires, is available in the rear of the book. The rules in chancery are included in the appendix, as are forms for framing the various procedural devices. A pocket-part insert, ostensibly for the purpose of including yearly cumulative supplements, is also included.

The order of treatment of the subject matter is in the normal chronological sequence that procedural problems are apt to be encountered in litigation. Thus, the second chapter on jurisdiction is valuable to the lawyer faced with the problem of choice of courts. Thence follows a systematic discussion of all the various phases of chancery practice, from a chapter on general court administration through proceedings after remand.

A very definite need of the Mississippi bar is satisfied by this book. It will prove to be a valuable asset to all practitioners. A source for refreshing one's memory is provided for the experienced, and a general orientation for the novice. It should, therefore, occupy a prominent place in every lawyer's library. The regret of the reviewer is that similar works dealing with practice in the circuit courts of Mississippi is not available.

*Ernest M. Jones**

LAW OF CADAVERS. By Percival E. Jackson. Second Edition.

New York, New York, Prentice-Hall, Inc., 1950. pp. 685. $12.50.

"Is a corpse real or personal property" was a question apt to be asked an applicant who appeared before a chancellor of an East Mississippi district for admission to the bar around the turn of the century. When that chancellor became dean of the Law School thirty years later he stated that he never got one correct answer to that question.

Although the solution was available in many texts and decisions extant at that time, it was not so attractively presented as has been done by Percival E. Jackson in the instant work. Apparently enchanted with his ghoulish subject he has written extensively, including an exhaustive glossary of forms. In addition there is a table of more than 2800 cases, all cited in the text. Not content with a thorough brief of

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the law of his subject, the author has formulated an informative and interesting history of his topic.

Beginning more than a thousand years before the Christian era, a history of burial and graveyards is meticulously traced to the present time. Comparisons are made between the modern and early methods of burial.

The author, being a member of the New York bar, adopts that state's law and lore on the subject in his book. There, is located the oldest burial ground for white Americans, and there, originated the first disquieting problems of disposing of the numerous dead. Though burying in this area has been for many years wholly prohibited, the aldermen of the City of New York more than a hundred years ago held this to be sacred soil and forbade the proposed extension of streets.

Strangely enough, a large part of the law governing burial associations and cemetery corporations is of unlawful origin. In the second century certain Roman religious societies and other congregations of non-conformists, in the guise of benefit and burial societies, sought protection from the state for their communal property. From then until recent times the religious unit usually owned and controlled the burial yard. Elaborate and expensive burials were in demand, and it was requried that and expensive burial place also accompany the scheme. All types of regulations were formed because of demand. The hours for burial, as well as, the size and height of the grave marker and other such details, are usually rigidly controlled.

Mr. Jackson considers the law of almost any problem that may arise concerning the right of possession, interment, disinterment and transportation of a dead body. In addition, he has included the case law on burial and burial grounds. Should litigation develop in this field of the law, this is the first book which should be examined.

Attention should also be centered on the voluminous set of forms with which the author concludes his labors. Often the young lawyer is confronted with the problem of finding the appropriate form. This is not true with one who has a law suit concerning cadavers, their disposal, interment or disinterment, for here may be found forms of pleading for every imaginable sort of action concerning them.

*Quitman Ross**

BOOKS RECEIVED

UNITED STATES CITIZENSHIP. By Ernest H. Campbell and George D. Smith. Seattle, Washington, University of Washington Press, 1951. pp. 94. $1.50.

GAMBLING—SHOULD IT BE LEGALIZED? By Virgil W. Peterson. Springfield, Illinois, Charles C. Thomas, Publisher, 1951. pp. 158. $2.75.

SUPREME COURT PRACTICE. By Robert L. Stern and Eugene Gressman. Washington, D. C., Bureau of National Affairs, Inc., 1950. pp. 550. $7.50.

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